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IN THE

Supreme Court of the United States

JUSTINE MALDONADO,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the four justice majority of the Michigan Supreme Court violated the First Amendment by sustaining a trial court's dismissal of a state civil rights action because of extrajudicial statements by the plaintiff and by her counsel under a procedure that conflicted with the minimum procedural protections for regulating extrajudicial speech that have been established by decisions by the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits and by the highest courts of Illinois, Maryland, Montana, New Mexico and Ohio.

2. Whether the four-Justice majority of the Michigan Supreme Court violated the First Amendment by sustaining a trial court's dismissal of a state civil rights action on the basis of extrajudicial speech by the plaintiff where there was no order restricting such speech by the plaintiff.

3. Whether the four-Justice majority of the Michigan Supreme Court violated the First Amendment by sustaining a trial court's dismissal of a state civil rights action on the basis of extra-judicial speech by plaintiff's counsel where the only restriction on such speech was a trial court's oral reference to a state bar ethical rule that is vaguer than the one held void for vagueness in *Gentile v State Bar of Nevada*, 510 U.S. ~~1030~~ 1030 (1991).

4. Whether the four-Justice majority of the Michigan Supreme Court violated the First Amendment by sustaining a trial court's dismissal of a state civil rights action on the basis of extrajudicial statements by the plaintiff and her counsel that the three dissenting Justices found were well within the parameters protected by the First Amendment.

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REFERENCE TO DECISIONS BELOW

The July 31, 2006, decision of the Michigan Supreme Court is published as *Maldonado v. Ford*, 476 Mich. 372, 719 N.W.2d 809 (2006). The April 22, 2004, decision of the Michigan Court of Appeals and the August 21, 2002, decision of the Wayne County Circuit Court are unpublished. All three decisions are reproduced in the appendix to the petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the July 31, 2006, decision of the Michigan Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The provisions involved are set forth in the appendix and are as follows:

U.S. Const., Amend. I

MCL § 600.611; MCL § 780.623

Michigan Court Rules (MRC), Rule 2.504(B)(1)

Michigan Rules of Professional Conduct (MRPC), Rules 1.2, 3.5, 3.6 and 8.4.

STATEMENT OF THE CASE

A. *The underlying facts.*

The petitioner Justine Maldonado seeks review by this Court of a 4 to 3 decision by the Michigan Supreme Court sustaining the dismissal of her sexual harassment lawsuit against Ford Motor Company on the sole basis of out-of-court statements made by her, by her attorneys, and by third parties about the facts that gave rise to her suit.

Maldonado, a production worker at Ford's Wixom Assembly plant, filed her complaint in a state circuit court on June 9, 2000, asserting that Daniel Bennett, one of her supervisors, had on three occasions exposed himself to her, assaulted her, and demanded sexual relations with her. She alleged that Ford had violated the state civil rights act because the company had ignored her complaints about Bennett as well as an earlier complaint by another production worker that Bennett had exposed himself to and otherwise harassed her inside the plant. Maldonado's complaint also asserted that Ford was responsible for Bennett's sexual abuse of her because it had ignored prior reports that Bennett had been convicted of indecent exposure in yet another incident.

Soon after Maldonado filed her complaint, she obtained the police reports regarding that other incident from a freedom of

information request filed with a local police department. The police reports revealed that in August 1995 Bennett had been arrested and later convicted of indecent exposure for acts that he committed while driving a Ford test car that he was evaluating as part of his duties as a quality control official. According to the reports, Bennett followed three high-school girls on a freeway and then drove up next to their van, rose up from his seat, and exposed himself to the young women. The officers reported that they told Ford what Bennett had done the night of the incident.

Ford filed a motion to exclude evidence of Bennett's harassment of the high school girls from the trial of this case under the claimed authority of MRE 401 and MRE 403. Maldonado responded by asserting that the evidence was admissible as a similar act by Bennett and as evidence that Ford knew of and did nothing about the danger of future sexual harassment by Bennett. At a hearing on January 19, 2001, the trial court granted Ford's motion in limine, stating that it might reconsider that ruling at trial. App. 33a-34a, n. 2.

Maldonado immediately filed an interlocutory appeal from that order. By divided votes, the Michigan Court of Appeals and Michigan Supreme Court denied that appeal, without prejudice, on July 2, 2001, and April 2, 2002, respectively.

B. *The public comments by Maldonado and her attorneys.*

Just after the trial judge granted the motion in limine, the *New York Times* published an extensive article about sexual harassment at Ford, centering on Maldonado's case and setting forth Bennett's conviction and the facts underlying it. *New York Times*, "If Women Complain, Does Ford Listen?", January 28, 2001. Ford filed no protest with the trial court, with the state bar committees, or with plaintiff's counsel about the comments by the plaintiff or her counsel in that article.

On September 11, 2001,[1] Maldonado's counsel issued a press release on law firm letterhead announcing that two other women were filing separate sexual harassment cases against Bennett and Ford. The press release also stated that Maldonado had filed an appeal on the evidence questions and was filing a motion to disqualify the trial judge.[2] The release stated that the trial in Maldonado would occur "soon," although no trial date had actually been set. App. 96a.

In the course of describing all three women's claims, the press release described the assertions in the police reports about Bennett's actions on the freeway. By that time, the police reports were in public files at the local police department and in two state trial courts and the Court of Appeals and Supreme Court. In addition, the fact of the conviction had already been published in the *New York Times* and the *Detroit Free Press*.

In September-October 2001, the local media published or broadcast seven stories about Maldonado's case. Most referred to the conviction and the events leading to it, but none quoted plaintiff or plaintiff's counsel on that subject. App. 4a, n. 5).

In November 2001, Bennett's attorneys filed a motion in a local district court to expunge Bennett's conviction under a Michigan statute that allows persons with good behavior to have their first criminal conviction expunged from their record. MCL 780.623. As neither Maldonado nor any of the other women victims at Wixom were parties to that case, they had no notice of it. Without knowing what Bennett had done to those women, the district court granted the motion to expunge Bennett's conviction.

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[1] The release was issued shortly before the planes crashed into the World Trade Center on that day.

[2] The disqualification motion asserted improper ex parte contacts by the first trial judge. It was later denied by the trial judge and by the presiding judge.

Immediately, Bennett's attorneys threatened Maldonado and her attorneys with prosecution if they mentioned his conviction again, citing a provision in Michigan's expungement statute which makes it a misdemeanor for a person to "divulge," "use," or "publish" an expunged conviction. MCL 780.623(5); App. 100a. Maldonado's attorneys replied that the statute did not cover republication of facts that were already part of a public record—and that if it did, the statute was unconstitutional.

On January 11, 2002, the Court set July 8, 2002 as the date for trial in Maldonado and, shortly thereafter, appointed a new trial judge for the case. Just before a May 17, 2002, hearing on Ford's motion to exclude testimony of six other victims of Bennett's harassment, counsel for Bennett and Ford requested an in-chambers conference with the trial judge. In that conference, of which no record was made, counsel for Bennett and Ford asked for a gag order under the claimed authority of the expungement statute. Counsel for Maldonado asserted that the statute did not apply to comments about a conviction that was already public—and that if it did apply to those comments, the statute was unconstitutional. The trial judge refused to rule on the validity of the statute and specifically refused to issue a gag order. App. 5a-6a.[3]

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[3] The Supreme Court claims to quote the plaintiff's counsel as stating that it was "worth the risk" to publish the information. App. 21a. But there is no evidence to support that quote because there was no hearing or record on the day it was purportedly said. What actually happened is that the trial court gave counsel avuncular advice not to risk violating a criminal statute. Counsel stated that the statute—which assertedly prohibited any mention of the conviction—was unconstitutional and that it could be "worth the risk" to test it. That statement is in full accord with an attorney's right to advise a client to test a statute believed to be unconstitutional, as provided by Rules 1.2(c) and the comments to Rule 8.4 of the Michigan Rules of Professional Conduct. App. 102, 108a-109a.

Following that conference, the trial court conducted a number of public hearings on Ford's motions to exclude testimony from six other victims of Bennett's harassment. The media were present at many of those hearings and counsel for all parties spoke to the media after some of those hearings. There is no claim that any attorney for the plaintiff made extrajudicial statements to the media about Bennett's conviction or the facts leading to it after September 11, 2001.

Nevertheless, the articles and broadcasts from May 17, 2002 through July 2002 often referred to Bennett's conviction App. 6a, n. 19. Moreover, in mid-June, the plaintiff herself told a local weekly newspaper that "[Ford] is investigating everything in my life, but not the man who did it to me, not the man who had the criminal record, [who] was in a company car and exposed himself to high school girls. . ." App. 34a.

After counsel for Ford complained about the last-mentioned article at a public hearing on evidence motions on June 21, 2002, the trial judge made his first on-the-record comments regarding publicity in the case:

> I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.

App., 8a-9a, 36a-38a.

The judge never incorporated his comments in an order and, indeed, later said that the comments quoted above were not an order. App. 35a-36a, 45a.

In a deposition conducted three days after the above-quoted comments, Maldonado testified that from the time that

Bennett's conviction was expunged in November 2001, until June 24, 2002, she told between 10 and a 100 people about that conviction. She then vowed to continue telling anyone who would listen about that conviction, because, she said, "[T]his man is a menace and he must be stopped. . ." App. 9a-10a.

On June 26 and 27, 2002, the Justice for Justine Committee held demonstrations and distributed leaflets at Ford World Headquarters and at the Ford plant where Maldonado had worked. There is also no claim that the plaintiff or her counsel had any role in writing, producing, or distributing those leaflets. The leaflets recounted some of the publicly-known facts of the case, including the conviction, and criticized the trial judge for accepting campaign contributions from one of Ford's attorneys. App. 94a-95a. An attorney for Maldonado was present at the demonstration at Ford World Headquarters, but she did not identify herself as an attorney and she made no statement of any kind to the media.

At the June 26 rally, Maldonado was interviewed by a local television station and made the following statement:

> If we don't act the way he [the trial judge] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment.

App. 10a.

Two days later, Ford and Bennett moved to dismiss plaintiff's case based on every article and broadcast that had appeared since January 2001.

Before the trial judge ruled on that motion, plaintiff's counsel made one further statement to the media. After discovering that an attorney who was representing Ford in Maldonado's lawsuit was the treasurer for the major fund-raiser in the trial judge's on-going election campaign, the plaintiffs filed a motion to disqualify the second trial judge.

After the trial judge denied that motion on July 3, one of Maldonado's attorneys made the following statement to the media:

> Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased judicial rulings in these cases.

App. 11a.

C. *The trial court decision dismissing the case.*

On August 21, 2002, the trial court issued an Opinion and Order granting Ford's motion to dismiss the plaintiff's case with prejudice on the grounds that the plaintiff and her attorneys had engaged in "prejudicial pretrial publicity."

The trial court found that Maldonado, who was not an attorney, had nevertheless violated Rule 3.6 of the Michigan Rules of Professional Conduct. App. 86a-87a. The trial court then held that her disclosures of Bennett's conviction to her friends, family and others from November 2001 forward violated Rule 3.6. App., 84a. The trial court also found that Maldonado violated Rule 3.6 by her June 26, 2002, statement that she would continue to fight sexual harassment even though the judge had threatened to dismiss her case with prejudice. App. 85a-86a.

The trial court also held that Maldonado's attorneys had violated Rule 3.6 by the September 11, 2001 press release. The court further found that counsel and Maldonado had violated Rule 3.6 and Rule 8.4(a) because the persons responsible for the leaflet distributed at the June 26 rally "seem to be intimately connected to the plaintiff" and "at a minimum" neither the plaintiff nor her counsel ". . . attempted to dissuade [those persons] from distributing circulars that

highlight evidence ruled inadmissible by two judges. . ." App. 87a-88a.

The trial court specifically rejected the plaintiff's claim that her speech and that of her attorneys was protected by the First Amendment because, the trial court held, her case was distinguishable from this Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). App. 90a.

D. *The Court of Appeals decision reversing the trial court.*

In December 2003 and January 2001, Michigan's Attorney Grievance Commission dismissed all charges that plaintiff's counsel had violated the ethical rules by the public sttements that they made.

In an April 22, 2004 Opinion, the Michigan Court of Appeals reversed the decision of the trial court, holding that by failing to issue a written order specifying what speech was prohibited by whom, the trial judge had punished speech under an "unconstitutionally vague standard that conflicts with the due process requirements set forth in *Gentile*." App. 70a. The Court of Appeals further held that the trial court had failed to comply with *Gentile* because it had failed to conduct a hearing to determine whether any prejudice had in fact resulted from the statements of the plaintiff or her counsel. App. 69a-70a.

The Court of Appeals remanded for that hearing, with a concurring justice stating that no hearing was necessary and that the case should proceed to trial. App. 78a.

E. *The decision of the Michigan Supreme Court reinstating the decision of the trial court.*

The four-Justice majority in the Michigan Supreme Court reversed the Court of Appeals and reinstated the decision of the trial court dismissing Maldonado's lawsuit.

According to the majority, ". . . whether a court order existed or whether a court rule applied, plaintiff was not free to repeatedly publicize excluded evidence, especially with the trial impending." App. 13a, n. 15. Although the majority repeatedly asserted that Maldonado made "repeated references to the excluded evidence just weeks before trial" App. n. 25, the only evidence it cited was the plaintiff's statement to the to the local weekly just before the trial court's comments of June 21, 2002.

The majority held that Maldonado had violated MCR 2.504(B)(1), which declares that a court can dismiss a case if a party violates a court order. The majority asserted that Maldonado had violated the June 21 comments which the trial court later said were not a gag order. App. 22a, 45a-46a.

On at least twelve occasions in its Opinion, the majority also claimed that plaintiff's counsel's made "repeated public references to Bennett's excluded conviction" App. 2a; 13a, n. 15; 18a; 21a, n. 24; 23a; 24a; 26a; 29a. But apart from the September 11, 2001, press release, the majority cited no statement by counsel to the media in which counsel referred to or even mentioned evidence regarding the conviction or the facts underlying it. Instead, the Court majority asserted that plaintiff's counsel was responsible for every republication of the conviction after September 11 by all of the local news media—even though the information in the press release and those media accounts were part of the public record of the case. App. 4a, n. 5; 6a, n. 9.

The majority also held that plaintiff's counsel was responsible for the statements of others about the conviction in any broadcast where the plaintiff's counsel had spoken and asserted that plaintiff's counsel had demonstrated their intent to actually publish the excluded evidence by arguing in court that the plaintiff and her attorneys had a *right* to speak about the conviction. App. 6a, n. 7.

The majority further suggested that counsel had violated the judge's "order" by providing information to a local reporter and by speaking fifty miles away from the court at a public meeting at which representatives of the media were not even present. App. 6a-7a; 8a, n. 11.

In dissent, Justice Cavanagh, writing for three justices, declared that the statements of the plaintiff and of her counsel were protected by the First Amendment and that the trial court had failed to meet minimal constitutional standards by not conducting a hearing on the request for a gag order and by claiming that comments by the trial court that were, at best, vague and fleeting could substitute for the narrowly-tailored order that was required if speech was to be restricted. App. 35a-36a, 40a.

Justice Cavanagh also declared that the trial court had applied a double standard, dismissing the case because of comments by the plaintiff's counsel while ignoring numerous comments to the press by defense counsel that violated Rule 3.6. He found that the statements of plaintiff and her counsel made were "well within the parameters of the First Amendment. App. 58a-59a.

In a separate dissent, Justices Weaver and Kelly concurred with Justice Cavanagh. They set forth the factual distortions in the majority's tireless assertions that counsel had made repeated statements to the media about the expunged conviction. As Justices Weaver and Kelly stated, plaintiff's counsel made no statements to the media about that subject after the September 11 press release. App., 58a-59a.

Justices Weaver and Kelly concluded that the trial court had dismissed the case on a "whim" and that the majority's decision affirming that dismissal "damage[d] the integrity of the judicial system" and "undermine[d] the basic tenets of an organized society." App. 59a.

REASONS FOR GRANTING THE WRIT

I. THE MICHIGAN SUPREME COURT APPROVED AN EX POST FACTO PROCEDURE FOR PUNISHING SPEECH BY ATTORNEYS AND PARTIES THAT CONFLICTS WITH THE MINIMUM PROCEDURAL SAFEGUARDS ESTABLISHED BY DECISIONS OF THE SECOND, THIRD, SIXTH, SEVENTH, NINTH, AND ELEVENTH CIRCUITS AND OF THE HIGHEST COURTS OF ILLINOIS, MARYLAND, MONTANA, NEW MEXICO, AND OHIO.

A. Before restricting speech about a pending case by parties or their attorneys, a court must balance the specific rights to free speech and to a fair trial.

In *Bridges v. State of California*, 314 U.S. 252, 263 (1941), this Court held that extrajudicial statements by parties about pending cases may be restricted only if the evil that flows from that speech is "extremely serious" and the degree of imminence of that evil is "extremely high."

Bridges based that holding on an analysis of the importance of such speech to public debate. As the Court held, public interest in important issues "is much more likely to be kindled" by a controversial legal case than by a "generalization, however penetrating, of the historian or scientist." Restricting speech by participants in the trial will thus fall at the "precise time when public interest in the matters discussed would naturally be at its height" and on those cases which raise "the most important topics of discussion." *Id.*, 314 US at 268-269. See also *Gentile, supra*, 314 U.S. at 1035 (Kennedy, J.).

This case illustrates those principles. At Wixom and in many other auto plants, one fourth of the workers are now women. Numerous scholars have written articles about the

sexual harassment that women face in those plants. But it was Maldonado's case that sparked a large-scale public discussion about that sexual harassment—and that debate naturally peaked at the crucial procedural turning points in her case.

Bridges, of course, did not recognize an absolute right for counsel or even a party to participate in all aspects of a public debate over a pending case. As ". . . free speech and fair trial are two of the most cherished policies of our civilization, *Bridges, supra.*, 314 U.S. at 260, this Court has recognized that a trial court may in extraordinary circumstances restrict the speech of attorneys or parties on certain subjects at certain times. *Gentile, supra*, 501 U.S. at 1057-1058 (Kennedy, J.), at 1075-1076 (Rehnquist, C.J.). But before it imposes such a limit, the trial court must *balance* carefully the importance of the particular speech and the claimed harm that is alleged to flow from that speech:

> Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interest should also be weighed.

Gentile, supra, 501 U.S. at 1036 (Kennedy, J.), citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-843 (1978).

As this Court has held, where a court is asked to restrict First Amendment rights, it must observe "careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968). While this Court has not specified the procedures that a court must use in balancing the rights of

parties and attorneys to speak about pending cases, six circuit courts of appeals and five state supreme courts have established the minimum procedural protections that must be guaranteed in such circumstances.

As will be seen, the decision of the majority of the Michigan Supreme conflicts with *every* decision rendered on that subject by those courts.[4]

B. The cursory, ex post facto procedure approved by the Michigan Supreme Court majority conflicts with the procedural protections required by six federal circuits and five state supreme courts.

In the leading case, the Seventh Circuit held that *before* a court may restrain parties or their attorneys from making public statements about a pending case, it must make specific findings of fact sufficient to establish that that there is a "serious and imminent threat to the administration of justice" sufficient to outweigh the First Amendment rights of the party that objects to the restraint. *Chase v. Robson*, 435 F 2d 1059, 1061-1062 (7th Cir. 1970). The court must then issue an order that is "narrowly drawn" so that is does not prohibit speech "which will not have an effect on the fair administration of justice." *Id.*

In the 26 years since *Chase*, the Second, Third, Sixth, Ninth, and Eleventh Circuits have followed that decision and held that a trial court must conduct a hearing before restraining speech, and, on the basis of evidence produced at that hearing, must enter specific factual findings establishing the need for the particular restraint and the absence of any less restrictive alternative. On the basis of those findings, the

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[4] Moreover, as Justice Cavanagh states in his dissent below, the trial court in this case did not even consider whether there was in fact any prejudice to the defendant's right to a fair trial. App. 46a-47a.

trial court must then enter a narrowly-drawn, prospective order restraining the particular speech by attorneys or parties that it has found will endanger the right to a fair trial. See, e.g., *United States v. Salameh*, 992 F. 2d 445, 447 (2d Cir. 1993) (first World Trade Center bombing case); *Bailey v. Systems Innovation*, 852 F. 2d 93, 99-101 (3rd Cir. 1988) (alleged fraud in public contracts); *CBS, Inc. Young*, 522 F. 2d 234, 239-241 (6th Cir. 1975) (Kent State shootings); *Levine v. United States District Court for the Central District of California*, 764 F. 2d 590, 593, 597-599 (9th Cir. 1985) *cert. den.* 476 U.S. 1158 (1986) (espionage trial of former FBI agent); *United States v. Noriega*, 917 F. 2d 1543, 1549 (11th Cir 1990) *cert. den. sub nom. Cable News Network, Inc. v. Noriega*, 498 U.S. 976 (1990) (prosecution of former President of Panama).

Only one circuit has dispensed with even one of those procedural requirements.[5]

Following the lead of the federal circuits, the highest courts in five states have also required similar procedures of hearings, specific findings, consideration of less restrictive alternatives, and specific and narrowly-tailored orders *before* the speech of trial participants is restrained. See, e.g., *State, ex rel. National Broadcasting Company, Inc. v. Court of Common Pleas of Lake County*, 52 Ohio St.3d 104, 108 (1990) (murder trial struck); *Kemner v. Monsanto Company*, 112 Ill.2d 223, 244-248 (1986) (dioxin trial); *Twohig v. Blackmer*, 121 N.M. 746, 754 (1996); *State ex rel Missoulian v. Montana Twenty-First Judicial District Court, Ravalli County*, 281 Mont. 285, 305 (1997). See also *Attorney Grievance Commission v. Gansler*, 377 Md. 656 (2003) (prosecutor's comments).

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[5] See *In re Russell*, 726 F. 2d 1007 (4th Cir. 1984)(no hearing necessary before issuing prospective order preventing witnesses from talking to media in Greensboro shooting case).

The decision of the Michigan Supreme Court majority conflicts with *all* of those decisions. It claims that the trial court's spontaneous comments on June 21, 2002, constituted an effective gag order binding on the attorneys and the parties.

But those comments were issued without *any* hearing or *any* motion. Far from being a careful consideration of anyone' rights, the trial court admitted that it did not even know who had said what and why before it issued this "order." App. 8a-9a; 36a-38a.

Announcing gag orders by impromptu comments from the bench can not possibly balance the fundamental constitutional rights at issue. As the dissent below states, the comments and the Supreme Court's decision amount to a *per se* rule converting the earlier order excluding evidence into an order banning any public comments about that evidence. App. 34a. Such a rule automatically converts the rules of evidence into the rules governing public debate and automatically elevates the claimed right to a fair trial over the right to free speech. By doing so, it also automatically shields the court from any extrajudicial criticism of its rulings by parties or by their attorneys, because both are automatically prohibited from even mentioning outside the court the evidence that the trial court has excluded.

Even worse than that, the procedure sanctioned by the Michigan Supreme Court amounts to an ex post facto gag rule. As set forth in the majority opinion, the only statements by Maldonado's attorneys about Bennett's conviction occurred in a press release issued ten months *before* the June 21, 2002 "order." Even assuming that all of the later media accounts of Bennett's conviction had their origin in that press release—which is factually untrue and legally untenable (see infra, at 23-24)—the fact remains that the trial court dismissed this action on the basis of press release issued by counsel ten months *before* the supposed gag "order."

As is apparent, the procedure approved by the Michigan Supreme Court majority conflicts with *all* of the decisions set forth above--and with the minimal standards of due process that have been followed for years.

As the procedure approved by the Michigan Supreme Court majority guarantees that freedom of speech on matters of great public importance will be abridged again and again, the petitioner asks this Court to grant the writ and reverse the decision of the majority of the Michigan Supreme Court.

II. BY PENALIZING SPEECH UNDER STANDARDS THAT ARE OBVIOUSLY VOID FOR VAGUENESS, THE MICHIGAN SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF SIX CIRCUIT COURTS OF APPEALS AND WITH DECISIONS BY THIS COURT.

A. There was no standard regulating speech by the plaintiff.

This Court has repeatedly held that an order restricting First Amendment rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate. . ." See, e.g., *Carroll, supra*, 393 U.S. at 183. As set forth above, six federal circuits and five state supreme courts have followed that ruling by requiring precise and narrowly-tailored orders as the means to restrict speech by parties or their attorneys.

In this case, however, the majority of the Michigan Supreme Court has affirmed the dismissal of the plaintiff's case in the absence of *any* standard by which the plaintiff could have judged or regulated her speech. At most, the trial court's June 21 comments incorporated the Michigan Rules of *Professional* Conduct. But Maldonado is not an attorney and she had no reason to suspect that the trial court's June 21

comments restricted her statements to the media or, still less, to anyone else.

Moreover, even if the plaintiff had somehow guessed that the trial court's June 21 comments did apply to her, those comments did not prohibit reference to any specific subject, including Bennett's conviction. App. 38a. And, in any event, the June 21 comments were issued after almost all of the statements by Maldonado that the Supreme Court claimed justified the dismissal of her case. App. 21a.

The Michigan Supreme Court majority attempted to gloss over the trial court's failure to issue any order that covered Maldonado by asserting that she recognized that she was bound by the trial court's June 21 comments when she told the media that she intended to continue fighting sexual harassment even though the judge had threatened to dismiss her case with prejudice. App. 6a, n. 8. But with First Amendment rights at stake, the plaintiff's recognition that the trial judge might dismiss her case under some circumstances can not possibly substitute for the trial judge's constitutional obligation to provide her with an order specifying what those circumstances were.

The Michigan Supreme Court majority not only ignored the Constitutional mandate for a clear, narrow and precise order. It defied that standard: "[We] reiterate that whether a court order existed or whether a court rule applied, plaintiff was not free to repeatedly publicize excluded evidence, especially with trial impending. . ." App., at n 15.

That holding stands in direct defiance of *Carrroll* and in direct conflict with the decisions of the six circuit courts of appeals and the five state supreme courts set forth above.

B. The standard announced for regulating speech by Maldonado's attorneys was void for vagueness.

The Michigan Supreme Court majority's treatment of the statements by plaintiff's attorneys also displays an open disregard for the governing decisions of this Court.

As noted, the trial court's June 21 comments incorporated Rule 3.6 of Michigan's Rules of Professional Conduct.[6] But as the Michigan Supreme Court majority refused to acknowledge, this Court struck down standards like those in Michigan's Rule 3.6 as void for vagueness. *Gentile, supra.*, 501 US at 1048-1049 (Kennedy, J.) and at 1082 (O'Connor, J.).

In fact, the Michigan Rule is *vaguer* than its Nevada counterpart. The Michigan Rule itself, which is an authoritative declaration by the Michigan Supreme Court, contains no statement of the subjects on which an attorney may or may not comment. It is, however, followed by comments, which are not authoritative but which offer "guidance" in "this difficult area." App. 104a-107a.

Those guidelines state only that an attorney "ordinarily" should not make statements to the media about the "criminal record" of a party or about evidence that is "likely to be inadmissible at trial." Even the comments, however, provide no standard for determining when the "ordinary" standard does not apply, nor any guidance on how counsel is supposed to determine when it is "likely" that evidence will be excluded at trial.

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[6] Even though the trial court did not refer to a specific ethical rule in its June 21 comments, the Michigan Supreme Court majority declared that both Rule 3.5 and 8.4 may also have been violated. App., 23a-24a. But as a quick review of those rules reveals, they provide far less specific standards than Rule 3.6. App. 102a-103a, 106a-107a.

Moreover, the comments to Michigan Rule 3.6 specifically provide that "notwithstanding" any specific prohibition, a lawyer may state to the media "without elaboration" the "general nature of the claim or defense" and may tell the media about "information contained in a public record." App. 105a.[7] But this Court squarely held in *Gentile* that the equivalent "notwithstanding" clause in the Nevada rule rendered it void for vagueness because counsel could reasonably conclude that if he described the general nature of the defense, he could comment on evidence that fell within one of the prohibited areas. *Id.*, 501 U.S. at 1048-1049 (Kennedy, J.).

In addition, as to the first safe harbor applicable here—allowing a lawyer to state the general nature of a claim or defense—*Gentile* held that the standard was unconstitutionally vague, because it provided no principle for "determining when [the lawyer's] remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.*, at 1049 (Kennedy, J.).

Similarly, as to the second safe harbor at issue here—allowing a lawyer to make truthful comments about matters that are in public records—the Maryland Court of Appeals held that that safe harbor "suffers from constitutional infirmities similar to those of Nevada's Rule" because it fails to "provide adequate guidance" for determining what are "public records" and thus what "extrajudicial statements

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[7] Both safe harbors further constitutional rights. The first safe harbor protects society's right to crucial information about pending legal proceedings. *Gentile, supra*, 501 U.S. at 1057. The second recognizes the principle that citizens should not be punished for speech on matters contained in public records. See discussion *infra*, at 23-24, citing *Cox Broadcasting Corp v. Cohn*, 420 US 469, 496 (1975); *Landmark Communications, Inc., supra.*

would qualify" for protection under the Rule. *Gansler, supra*, 377 Md. at 687, 690 (striking down discipline imposed on prosecutor for commenting to media about physical evidence, confession and criminal record of defendant).

The Michigan Supreme Court had the opportunity—*and the constitutional obligation*—to insist that the trial court clear up the vagueness by tailoring an order "as precisely as possible to the exact needs of the case." *Carroll, supra*, 393 U.S. at 184. But it did not do so.

Again, the Michigan Supreme Court majority was open in describing its claimed right to dispense with the requirement for a narrow and precise order:

> Even without an explicit order precluding plaintiff and her counsel from publicizing Bennett's excluded conviction, [the trial judge] chose a principled course in dismissing plaintiff's case to protect the administration of justice.

(App., at 821).

As Justice Cavanagh sets forth in this dissent, the trial court's vague standard had the classic faults that this Court has found with such standards. Counsel had no way to determine the speech that was prohibited.[8] Moreover the vagueness of the standard opened the way for dismissing the case for alleged violations of Rule 3.6 by plaintiff's counsel while doing nothing about defense counsels' repeated references to Bennett's conviction and to their repeated public

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[8] The vagueness of the standard is apparent in the conflicting decisions about the same statements by counsel. Four Justices found them to be in violation of Rules 3.6 and 8.4; three Justices found them entirely protected; and the Michigan Attorney Grievance Commission dismissed all charges of violations by plaintiff's counsel. If the state's expert decision-makers can not agree with the benefit of hindsight whether counsel's speech violated the ethical rules, it is obvious that those rules provide no standard to guide counsel's conduct or that of a trial court.

characterization of the plaintiff as a "liar" who was out to make a "quick buck." App. 41a.

As Justice Black declared in *Bridges*, the proclamation of a general standard for speech by parties, followed by ex post facto punishment for speech that supposedly ran afoul of that standard, creates a regime of censorship more pernicious than a statutory system of prior restraints:

> . . . it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in an utterance a 'reasonable tendency' to obstruct justice in a pending case.

Bridges, 314 U.S. at 269.

If that is true when a court imposes a contempt citation, it is even truer when a court later levies the far more serious sanction of dismissing a case because of a purported non-compliance with a general standard prohibiting any public statements that have a substantial likelihood of unfairly influencing a jury.

III. THE MICHIGAN SUPREME COURT MAJORITY WRONGLY DISMISSED THIS ACTION ON THE BASIS OF SPEECH THAT WAS PROTECTED BY THE FIRST AMENDMENT.

In considering requests to ban speech by parties or counsel about pending cases, *Bridges* directed the lower courts to construe the First Amendment ". . . as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Id.*, 314 U.S. at 263.

The majority of the Michigan Supreme Court ignored that command.

It begins by ignoring the actual facts. After asserting on twelve occasions that the plaintiff and her attorneys made "repeated" public statements about the conviction, the majority cites only *one* statement by plaintiff's counsel (the press release of September 11, 2001) and *one* statement by Maldonado (her statement to the weekly newspaper in June 2002) on that subject. See supra, at 10.

Even as to those statements, the majority then fails to acknowledge that the the statements referred to facts that were part of the public record in the files of a local police department and in the files of four separate courts in the State of Michigan, including the Supreme Court of Michigan itself.

The Michigan Supreme Court majority erred by ignoring this Court's holdings that a state can not sanction persons for publishing facts that are contained in its own files:

> In preserving that form of government, the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Cox Broadcasting Corp v. Cohn, 420 US 469, 496 (1975) (striking down conviction for publishing name of rape victim

in account of trial). See also *Landmark Communications, supra.*(striking down attempt to prosecute a newspaper for publishing records of confidential state judicial tenure hearing).[9]

The majority then compounded that error by holding the plaintiff and her attorneys responsible for every statement by the media about Bennett's conviction published after the September 11, 2001 press release. App. 4a, n. 5; 6a, n. 9. But as the dissent below states, the ". . . information about [Bennett's] conviction was available through numerous sources" that could be found by "any novice journalist willing to do a nominal amount of research." App., at 33a. Cavanagh, J., dissenting, citing *Gentile, supra*, 501 U.S. at 1046 (Kennedy, J.).

The fact that the trial court had entered an order tentatively excluding this evidence does not change the Constitutional standards. First, even as to this case, the ruling was not final: in September 2001, the plaintiff's appeal was pending in the Michigan Supreme Court and the trial court itself had said it might reconsider the ruling. Second, the trial court's order did not even apply to the other two cases that were the subject of the September press release.

More fundamentally, as the dissent declared, an order excluding evidence "[does] not preclude the plaintiff or her attorneys from ever mentioning the indecent exposure con-

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[9] The Supreme Court majority wrongly asserts that Maldonado committed some form of misconduct because she "told" a hundred people about Bennett's conviction. App. 21a. That would only be true if Michigan's expungement statute prevented a citizen's statements about a conviction that she learned of when it was part of a public record. But the Michigan Supreme Court never decided whether the statute covers such speech. As *Landmark* and *Cox* make clear, however, this Court would strike down such an Orwellian construction, because the government can not erase from public discourse statements about facts that undeniably occurred in a public courtroom.

viction in public again. . ." App., at 408, Cavanagh, J, dissenting. Accord. *Koller v. Richardson-Merrell, Inc.*, 737 F. 2d 1038, 1061-1062 (D.C. Cir. 1984), *rev'd. on other grounds*, 472 U.S. 424 (1985) (a "routine pretrial evidentiary ruling" is *not* the "equivalent of . . . a direct prohibition on dissemination of information to the public").

Finally, the Michigan Supreme Court majority's attempt to buttress its dismissal of this case by reference to other statements or actions by Maldonado's counsel further compounds the violation of the First Amendment rights by the majority. The majority, for example, claims that Maldonado's attorney's comment that it was "hard" to get "unbiased" rulings in a case against Ford in metropolitan Detroit is grounds for dismissing Maldonado's case. App. 22a-23a. But as the dissent below points out, that is a classic statement of political opinion entitled to the full protection of the First Amendment. App. 47a-49a.

Similarly, the majority's assertion that plaintiff and her counsel "continued the misconduct" by "appear[ing] in television broadcasts that specifically referred to the conviction" is utterly without merit—unless counsel is to be required to secure an agreement with the television stations to let counsel edit the broadcast afterwards to be sure that an announcer or another person who has been interviewed has not referred to the conviction in a segment filmed where counsel was not even present. App. 20a-21a.

As these and countless other comments make clear, the Michigan Supreme Court majority has punished speech in a sweeping and indiscriminate manner. This broad ruling will chill the speech of parties and attorneys in other cases of public importance—and it will especially chill speech that is critical of the judiciary.[10]

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[10] On the same day that the majority sustained the dismissal of Maldonado's entire case, the same majority imposed a reprimand on a prominent attorney for criticizing three appellate judges. See *Grievance*

In its prior decisions, this Court has rightly reviewed and struck down outlandish decisions that threatened to establish precedents that would destroy First Amendment rights. See, e.g., *Nebraska Press Association v Stuart*, 427 U.S. 539 (1976).

As the three dissenting Justices below recognized in their impassioned dissents, this is such a case. This Court should grant the writ and reverse a decision by the Michigan Supreme Court that is a wholesale attack upon the free speech rights of parties and of their counsel, and, ultimately, upon the right of the people to a free debate about issues of undeniable public importance.

CONCLUSION

The petitioner Justine Maldonado requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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November 13, 2006

Administrator v. Fieger, 476 Mich. 231 (2006), *pet. for cert. pending* No. 06-596. The *Fieger* petition shows that the attack upon speech by the Michigan Supreme Court extends beyond this case.

APPENDIX

APPENDIX A

SUPREME COURT OF MICHIGAN

Docket No. 126274

JUSTINE MALDONADO,
Plaintiff-Appellee/Cross-Appellant,

v.

FORD MOTOR COMPANY,
Defendant-Appellant/Cross-Appellee,

and

DANIEL P. BENNETT,
Defendant.

July 31, 2006

CORRIGAN, *J.*

In this case we consider the essential authority of trial courts to control the proceedings before them. The issue in this case pertains to the extent of a trial court's authority to govern the conduct of counsel and their clients in court proceedings. Where the Michigan Constitution authorizes us to make rules to govern court proceedings, the authority to enforce those rules inescapably follows. At the heart of preserving an organized polity, we must attend to relevant issues, including concerns over belligerent, antagonistic, or incompetent lawyering. To this end, we affirm the authority of trial courts to impose sanctions appropriate to contain and prevent abuses so as to ensure the orderly operation of justice.

We reiterate that trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta v. Serban*, 370 Mich. 367, 368, 121

N.W.2d 854 (1963); *Persichini v. Beaumont Hosp.*, 238 Mich.App. 626, 639-640, 607 N.W.2d 100 (1999); *Prince v. MacDonald*, 237 Mich.App. 186, 189, 602 N.W.2d 834 (1999). This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

In the instant case, we consider whether the trial court abused its discretion in dismissing plaintiff's case because plaintiff and her attorneys repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice. We conclude that because the trial court possessed the inherent authority to dismiss the action, and because the trial court warned plaintiff and her counsel that dismissal would result if they continued to publicize evidence ruled inadmissible by court order, the trial court did not abuse its discretion in dismissing plaintiff's case.

We also consider whether the trial court's dismissal of plaintiff's case because plaintiff intentionally disobeyed its explicit warning to refrain from publicizing information regarding defendant Daniel P. Bennett's excluded conviction violated the First Amendment. The trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from

prejudice. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The trial court's narrow restriction on speech did not offend the First Amendment. The Court of Appeals novel requirement that dismissal is improper unless the jury pool was actually tainted conflicts with the substantial likelihood of prejudice test of *Gentile*. Moreover, "actual taint" is an impossible and unworkable standard, especially where nearly three years have passed since the incidents occurred. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order dismissing plaintiff's complaint.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff Justine Maldonado, an employee of defendant Ford Motor Company, filed suit against Ford, alleging that a Ford supervisor, Daniel Bennett, sexually harassed her in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*[1] Ford (hereafter defendant) moved in limine to exclude evidence of Bennett's 1995 indecent exposure conviction. Judge Kathleen Macdonald, the original judge assigned to the case, granted defendant's motion and entered an order on February 16, 2001, excluding evidence of Bennett's prior conviction in this case and in another action brought against Bennett, *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005).[2] Plaintiff thereafter

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[1] We have previously considered other actions in which Daniel Bennett was accused of sexual harassment, *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005), and *McClements v. Ford Motor Co.*, 473 Mich. 373, 702 N.W.2d 166 (2005), mod 474 Mich. 1201, 704 N.W.2d 68 (2005).

[2] In the *Elezovic* case, Judge Macdonald also issued an order directing that witnesses be instructed that reference to Bennett's excluded conviction or any other excluded evidence would be considered a contempt of court, and would result in sanctions, including compensation to the court in the case of a mistrial. All the witnesses in that case, including plaintiff

sought leave to appeal to the Court of Appeals and this Court regarding Judge Macdonald's decision to exclude Bennett's prior conviction. Both the Court of Appeals and this Court denied plaintiff's application.[3]

On September 11, 2001, less than a month before a settlement conference scheduled for October 3, 2001, and shortly after a three-week trial resulting in a directed verdict for defendants in the *Elezovic* case, plaintiff's counsel issued a press release on firm letterhead that referred to Bennett's indecent exposure conviction, Judge Macdonald's exclusion of that conviction as evidence, and the impending trial in this case.[4] A series of news broadcasts and print media publications followed, replete with references to Bennett's prior conviction.[5]

Justine Maldonado, signed statements indicating that they had been advised of the court's ruling regarding inadmissible evidence, that they were not to mention any excluded evidence, and that they understood that sanctions would result from mentioning any excluded evidence.

As Justice Cavanagh notes, Judge Macdonald stated, upon entering the order of exclusion, that she might reconsider her decision to exclude the evidence during the course of the trial if need be. Justice Cavanagh, however, erroneously relies on this statement to conclude that plaintiff and her counsel were not precluded from "ever mentioning the indecent exposure conviction in public again . . . ." *Post* at 828 (emphasis omitted). Judge Macdonald's order remained in effect throughout this case. As such, plaintiff and her counsel were bound by the order.

[3] 465 Mich. 971, 642 N.W.2d 679 (2002).

[4] Justice Weaver claims that plaintiff only, and not her counsel, made public statements about the excluded conviction after Judge Macdonald entered the order of exclusion. The September 11 press release, however, which referred to the excluded conviction, was issued by plaintiff's counsel after the order of exclusion was entered.

[5] The following is a list of the publications stemming from plaintiff's counsel's September 11, 2001, press release, many of which refer to Bennett's excluded conviction: (1) The Associated Press wire story, September 12, 2001, referencing the excluded conviction; (2) an article in the

On November 9, 2001, Bennett's indecent exposure conviction was expunged in district court proceedings.

By order dated January 11, 2002, Judge Macdonald established a trial date of July 8, 2002.

In February 2002, Judge Macdonald was assigned to the family division of the circuit court. Consequently, this case was reassigned by lot to Judge William Giovan. On May 17, 2002, Judge Giovan held a hearing regarding the admissibility of propensity evidence not currently at issue. Plaintiff's counsel invited the media to this hearing. Despite Judge Giovan's order closing the hearing to the media, plaintiff's counsel directed the media to wait outside until the hearing concluded to discuss details regarding the hearing.

Immediately following the hearing, Judge Giovan met with all counsel to discuss plaintiff's counsel's continued public references to Bennett's prior conviction despite Judge Macdonald's previous court order and the expungement of the conviction. Bennett's counsel pointed out that plaintiff's counsel's behavior apparently violated MCL 780.623(5),[6]

Detroit Free Press, September 13, 2001, referencing the excluded conviction; (3) an article by the United Press International, October 10, 2001, referencing the excluded conviction; (4) The Associated Press wire story, October 10, 2001, referencing the excluded conviction; (5) a Fox 2 news broadcast held at the law office of Scheff and Washington, October 10, 2001, referencing the excluded conviction and providing a closeup of the conviction papers; (6) a WDIV news broadcast, October 10, 2001, referencing the excluded propensity evidence; and (7) an article in the *Oakland Press*, October 11, 2001, referencing the excluded conviction.

Justice Weaver contends that we assert that plaintiff's counsel referred to the excluded conviction in these publications. We assert no such thing. Rather, we merely state that these publications stem from plaintiff's counsel's September 11, 2001, press release. In other words, it was plaintiff's counsel's press release that prompted the mass of publications. Plaintiff's counsel's press release was designed to draw media attention to the excluded conviction and, as shown above, indeed accomplished its goal.

[6] The expungement statute states:

which criminalizes the divulgence, use, or publication of information regarding an expunged conviction. Plaintiff's counsel responded by stating that "it was worth the risk" to continue to publicize Bennett's expunged conviction.[7]

Judge Giovan declined to order plaintiff's counsel to obey MCL 780.623(5) because he considered it redundant to order an attorney to follow the law.[8] Despite Judge Giovan's expression of confidence that counsel would follow the law, plaintiff's counsel left the courtroom and met with the waiting media. This meeting resulted in extensive television news and press coverage, some of which again referred to Bennett's expunged conviction and the possible exclusion of the propensity evidence.[9] Shortly thereafter, plaintiff's coun-

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> Except as provided in subsection (2), a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both. [MCL 780.623(5).]

[7] Plaintiff's counsel's comments at this meeting also demonstrate that plaintiff's counsel continued to make public references to the excluded evidence despite the court order, contrary to Justice Weaver's contention.

[8] Justice Cavanagh mischaracterizes Judge Giovan's refusal to unnecessarily order an attorney to follow the law as a refusal to require the parties to refrain from referencing the excluded evidence. Justice Cavanagh's mischaracterization that "the trial court never thought it issued an order" in this case is preposterous. *Post* at 17. While Judge Giovan did not specifically enter a gag order, he did, on numerous occasions, direct the parties to abide by Judge Macdonald's order of exclusion, he subsequently denied plaintiff's motion to dissolve the order, and he orally warned the parties that dismissal would result for failure to abide by the order. Moreover, Justice Cavanagh's mischaracterization of the lower court transcript is rebutted by plaintiff's own comment, "If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice."

[9] The following is a list of the publications stemming from plaintiff's counsel's May 17, 2002, meeting with the media, some of which also

sel again discussed this case at a May 28 public meeting and a June 1, 2002, rally in Ann Arbor sponsored by BAMN (Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by any Means Necessary).[10]

Plaintiff subsequently moved to dissolve Judge Macdonald's order excluding Bennett's prior conviction from evidence. On June 13 and 21, 2002, Judge Giovan heard the motion. During that hearing, plaintiff's counsel mentioned that an article had been published in the June 12-18, 2002, issue of the *Metro-Times*, a free weekly publication readily available in the courthouse where jury selection was imminent. The article appeared on the front page of the newspaper and referenced Bennett's expunged conviction. This article prompted the following colloquy:

> *The Court:* But, you know, since you mentioned the article, where's this coming from? I thought that there is a prohibition against counsel speaking to-making public statements designed to affect trial.
>
> *Ms. Hardy* [defense counsel]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.

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referred to evidence that had been excluded before trial: (1) a WDIV news broadcast, May 17, 2002, referencing the excluded propensity evidence; (2) a WXYZ news broadcast, May 17, 2002, also referencing the excluded propensity evidence; and (3) The Associated Press local wire story, May 17, 2002, referencing the expunged conviction.

Again, contrary to Justice Weaver's contention, we do not assert that plaintiff's counsel actually made references to the excluded evidence in these publications. Rather, we assert that these publications stem from plaintiff's counsel's meeting with the media.

[10] Plaintiff's counsel, George Washington, Miranda Massie, and Jodi Masley, are all members of the BAMN organization.

The Court: Is counsel being quoted in this?

Mr. Washington [plaintiff's counsel]: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie and I were both quoted, all quoted.

The Court I'm not sure—well—

Ms. Hardy: It was initiated, without a doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but *the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning this expunged conviction so that some way, somehow, irrespective of this Court's ruling*—[11]

The Court: I'm not making any decisions about this, but I'm going to tell you one thing. *If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice*, or, and I

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[11] Although the article contained quotations from both plaintiff's counsel and defense counsel, defendant claimed that plaintiff's attorney provided the reporter with the extensive information in the article regarding Bennett's excluded conviction. Plaintiff did not deny this allegation.

Justice Cavanagh contends that because Bennett's counsel, on two occasions, referred publicly to Bennett's excluded conviction, plaintiff should not be punished for behaving as defense counsel did. We acknowledge that Bennett's counsel publicly referred to Bennett's excluded conviction. We disagree, however, that defense counsel's behavior mirrored that of plaintiff and her counsel. Bennett's counsel's limited references to the excluded evidence were prompted by plaintiff and her counsel. Defense counsel's statements were made in an attempt to minimize the damage caused by plaintiff's and her counsel's numerous public references to the excluded evidence. Unlike plaintiff's and her counsel's public comments regarding the excluded evidence, defense counsel's comments were not intended to taint the potential jury pool and cause prejudice to plaintiff.

> should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client. [Emphasis added.]

The court denied the motion to dissolve Judge Macdonald's previous order of exclusion.

Three days later, on June 24, 2002, plaintiff was deposed, at which time she admitted that she had disclosed facts regarding Bennett's expunged conviction despite the trial court's order disallowing such evidence. The following colloquy took place:

> [*Defense counsel*]: If you can give me a ballpark figure, how many times since you found out about the expungement have you told other people about the fact that Mr. Bennett had this conviction that was later expunged?
>
> [*Plaintiff's counsel*]: You mean at people, period, one person at a time?
>
> [*Defense counsel*]: Any individual, whether it's groups, how many times has she gone out and publicized it, divulged it.
>
> [*Plaintiff*]: I have no idea. It's been a lot.
>
> *Q:* Over 100?
>
> *A:* I don't know.
>
> *Q:* Over ten?
>
> *A:* Oh, definitely over ten, possibly over 100.
>
> *Q:* Okay.
>
> *A:* If I could get it out on the Internet, I would put it out on the Internet.

Moreover, plaintiff admitted during her deposition on June 24, 2002, that she would continue to disclose facts regarding Bennett's expunged conviction. She stated:

A: I'm aware that you're whining and crying because I'm talking about it all over town, yes, I am aware of that. I won't shut up about it. It's the truth. You can expunge it, but it's the truth, and I'm going to tell it, and you know what? I will tell anybody that will listen because this man is a menace and he must be stopped, and you know it and you know it [sic]. But you guys want to protect him, that's fine, I'm not. I don't have to protect Mr. Bennett.

Q: So you've been talking about it—

A: To anyone.

Q: —any chance you get, to anyone—

A: That's Right.

Q: —even though-even since you became aware that it was expunged?

A: Yes. Absolutely.

On June 26, 2002, two days after the deposition, plaintiff and certain of her counsel participated in a "Justice for Justine Committee" demonstration outside Ford headquarters. During the demonstration, participants distributed leaflets to the public containing information regarding Bennett's expunged conviction and evidence regarding Bennett's alleged behavior toward other female Ford employees that the trial court had ruled inadmissible. The leaflet also stated that Judge Giovan "is in Ford's pocket" and "is trying to keep the truth out of the courtroom." Also on this day, a television interview was broadcast on WDIV Channel 4, in which plaintiff stated:

> If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment.

A demonstration similar to that held on June 26, 2002, was held the following day at the Ford Wixom plant, at which a similar leaflet was distributed.[12]

On June 28, 2002, defendants moved to dismiss plaintiff's suit on the basis that plaintiff and her counsel engaged in improper pretrial publicity aimed at tainting the potential jury pool. On July 1, 2002, plaintiff responded by moving to disqualify Judge Giovan. On July 3, 2002, Judge Giovan heard and denied this motion. The same day, plaintiff's counsel, Miranda Massie, appeared in a television interview broadcast on WDIV, Channel 4. She stated:

> Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased judicial rulings in these cases.[13]

On July 8, 2002, the date on which jury selection was to begin, Judge Timothy Kenny heard plaintiff's appeal of Judge Giovan's denial of the motion for his disqualification and affirmed the denial. Also on July 8, 2002, Judge Giovan heard defendant's motion to dismiss.[14] Throughout the hear-

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[12] The following publications stemmed from the June 26 and 27 demonstrations: (1) a WDIV news broadcast, June 26, 2002, showing picketers holding signs stating, "Ford, stop buying judges"; (2) a Click on Detroit, Channel 4 website article, June 26, 2002, referencing the exclusion of the propensity evidence; and (3) an article in the *Detroit News*, June 27, 2002.

[13] As a result of this news broadcast, the following publications were released: (1) a Click on Detroit, Channel 4 website article, July 3, 2002, referencing plaintiff's and her counsel's belief that Judge Giovan was biased and (2) a Channel 50 news broadcast, July 3, 2002, in which plaintiff stated that money cannot buy justice.

[14] Also on this day, an article was published on the Click on Detroit, Channel 4 website concerning Judge Giovan's alleged bias.

ing, plaintiff and her counsel were discourteous to and uncooperative with the court. Specifically, in response to the court's question, "Are you a member of the 'Justice for Justine' committee?" plaintiff's counsel, Jodi Masley, responded by stating:

> Nobody's ever asked me that in my life. I—you know what. I fully support the "Justice for Justine", you know, committee. They have every right to do everything they [want]. And did I participate in a demonstration that was called by the "Justice for Justine" committee, I did.

Judge Giovan attempted to respond to Ms. Masley's comment, but she interrupted him, stating, "I mean, have I or have I ever been a member of the Communist Party, is that what this is?" Moreover, in response to Judge Giovan's inquiry regarding whether members of the "Justice for Justine" committee were present in the court, Ms. Masley stated:

> Have you guys even ever heard of the phrase "Freedom of association . . .?"
>
> * * *
>
> I have no idea. Do they need to know-identify their political affiliations . . .?
>
> * * *
>
> (Interposing) Who did you guys vote for in the last judicial election?

The hearing continued into the following day. At the conclusion of the two-day hearing, plaintiff requested permission to file a supplemental brief, which Judge Giovan granted.

On August 21, 2002, Judge Giovan issued an opinion and order dismissing plaintiff's case with prejudice, concluding that plaintiff and her counsel had engaged in premeditated

misconduct designed to tamper with the administration of justice and that no lesser sanction would deter plaintiff or her counsel.[15]

The Court of Appeals, affirmed in part, reversed in part, and acknowledged the trial court's authority to dismiss plaintiff's complaint, but remanded the case to the trial court to hold an evidentiary hearing to determine whether plaintiff's and her counsel's comments actually prejudiced the jury pool.[16]

Defendant sought leave to appeal to this Court. We directed the clerk to schedule oral argument on whether to grant the application or to take other peremptory action.[17]

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[15] Justice Weaver contends that Judge Giovan improperly attributed responsibility for plaintiff's improper references to plaintiff's counsel. As these facts clearly demonstrate, however, Judge Giovan properly determined that both plaintiff and her counsel engaged in behavior designed to taint the potential jury pool.

Justice Weaver further contends that plaintiff was not restricted by any order or court rule from making repeated public references to Bennett's prior conviction. While we disagree with the contention that no order or court rule barred plaintiff from making public references to the excluded evidence, we reiterate that, whether a court order existed or whether a court rule applied, plaintiff was not free to repeatedly publicize excluded evidence, especially with the trial impending. The only conclusion that can logically be drawn from plaintiff's repeated references to the excluded conviction is that plaintiff was improperly attempting to admit the excluded evidence by means of the mass media. Consequentially, Judge Giovan chose a principled option within his authority in dismissing plaintiff's case in order to protect the administration of justice. *Banta, supra* at 368, 121 N.W.2d 854; *Cummings v. Wayne Co.*, 210 Mich.App. 249, 252, 533 N.W.2d 13 (1995), citing *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F.Supp. 242, 244-245 (D.S.C., 1981).

[16] Unpublished opinion per curiam of the Court of Appeals, issued April 22, 2004, 2004 WL 868657 (Docket No. 243763).

[17] 471 Mich. 940, 690 N.W.2d 101 (2004).

II. STANDARD OF REVIEW

This case requires us to determine whether the Court of Appeals erred in reversing the trial court's dismissal of this case. Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action. *Banta*, *supra* at 368, 121 N.W.2d 854. "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Brenner v. Kolk*, 226 Mich.App. 149, 160, 573 N.W.2d 65 (1997). A trial court's dismissal of a case for failure to comply with the court's orders is also reviewed for an abuse of discretion. *Thorne v. Carter*, 149 Mich.App. 90, 93, 385 N.W.2d 738 (1986); MCR 2.504(B)(1).

In *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003), this Court noted that an abuse of discretion standard must be one that is more deferential than review de novo, but less deferential than the standard set forth in *Spalding v. Spalding*, 355 Mich. 382, 94 N.W.2d 810 (1959). This Court stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Babcock*, *supra* at 269, 666 N.W.2d 231. The *Babcock* Court further noted that "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard.

Additionally, in cases raising First Amendment issues, an appellate court is obligated to independently review the entire record to ensure that the lower court's judgment "does not constitute a forbidden intrusion of the field of free expression." *Gentile*, *supra* at 1038, 111 S.Ct. 2720 quoting *Bose*

Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 258, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

III. ANALYSIS

A. Trial Court's Authority to Sanction Litigants for Unethical Behavior

As stated above, trial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action. *Banta, supra* at 368, 121 N.W.2d 854. "The authority to dismiss a lawsuit for litigant misconduct is a creature of the 'clean hands doctrine' and, despite its origins, is applicable to both equitable and legal damages claims." *Cummings v. Wayne Co.*, 210 Mich.App. 249, 252, 533 N.W.2d 13 (1995), citing *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F.Supp. 242, 244-245 (D.S.C., 1981). "The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process." *Cummings, supra* at 252, 533 N.W.2d 13. "The 'clean hands doctrine' applies not only for the protection of the parties but also for the protection of the court." *Id.*, citing *Buchanan Home, supra* at 244.

Moreover, the Michigan Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government. "Const. 1963, art. 3, § 2 divides the powers of government among three branches and commits to each branch exclusive exercise of the functions properly belonging to it, except as otherwise expressly provided in the Constitution."[18] *In re 1976 PA 267*,

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[18] Const. 1963, art. 3, § 2 provides:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the constitution.

400 Mich. 660, 662, 255 N.W.2d 635 (1977). "Art. 6, § 1 vests the judicial power of the state exclusively in one court of justice."[19] *Id.* "Section 4 of that article[20] vests general superintending control over all courts in the state in the Supreme Court and § 5 confers upon this Court the power to make rules to govern the practice and procedure within the courts."[21] *Id.* "It is also well settled that under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government." *Id.* at 662-663, 255 N.W.2d 635. "The judicial powers derived from the Constitution include rulemaking, supervisory and other administrative powers as well as traditional adjudicative ones." *Id.* at 663, 255 N.W.2d 635. "They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization."

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[19] Const. 1963, art. 6, § 1 provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

[20] Const. 1964, art. 6, § 4 provides:

> The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

[21] Const. 1964, art. 6, § 5 provides:

> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

Id., citing *Attorney General ex rel., Cook v. O'Neill*, 280 Mich. 649, 274 N.W. 445 (1937).

Moreover, express authority to dismiss a complaint is conferred by statute and court rule in Michigan. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant."

Several of the Michigan Rules of Professional Conduct address sanctionable attorney conduct. MRPC 3.6 concerns trial publicity. It provides:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the *lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.*

[Emphasis added.]

MRPC 3.5 addresses impartiality and decorum of the tribunal. It states:

> A lawyer shall not:
>
> (a) *seek to influence a* judge, juror, *prospective juror* or other official *by means prohibited by law*;
>
> (b) communicate ex parte with such a person concerning a pending matter except as permitted by law; or
>
> (c) engage in undignified or discourteous conduct toward the tribunal. [Emphasis added.]

Finally, MRPC 8.4 deals with attorney misconduct. It provides, in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice.

B. The Trial Court's Authority to Dismiss this Case

In this case, Judge Macdonald initially concluded that evidence of Bennett's prior conviction was inadmissible before the jury because of its unduly prejudicial nature. Rather than abiding by the trial court's order, even after both the Court of Appeals and this Court denied plaintiff leave to appeal regarding the order, plaintiff and her counsel engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means. They continued to do so even after the trial court explicitly warned them that such misconduct would result in the dismissal of plaintiff's lawsuit.

The trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct but also serve as a deterrent to other litigants.

Moreover, MCL 600.611 and MCR 2.504(B)(1) provide the trial court with the authority to impose sanctions such as

dismissal. Here, Judge Macdonald issued an order excluding evidence regarding Bennett's expunged conviction. Judge Giovan later reaffirmed Judge Macdonald's initial order of exclusion, and explicitly warned the parties that he would dismiss the case if the inappropriate remarks regarding the excluded conviction continued.[22]

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[22] Both Justice Cavanagh and Justice Weaver claim that Judge Giovan's warning to refrain from engaging in pretrial publicity was not an order of the court. In doing so, they rely on Judge Giovan's statement that he "never issued a gag order" in this case. The dissenting justices, however, take this statement out of context. Judge Giovan clearly explained that a gag order was not necessary because rules were already in place governing pretrial publicity:

> So, what I say, I'm not going to issue a gag order because the rules of professional conduct already have a standard that bind you. So, why should Judge Giovan, who is only one of thousands of judges, select his own criteria for what people should say when we have standing rules that govern what attorneys are permitted to say?
>
> And one of the things that attorneys are not permitted to do is to make public statements that are intended to influence the outcome of a case. And when your opponents after several times coming to court accusing you and your colleagues and maybe the parties themselves of doing precisely that, I took no action.
>
> But after—on the day that this did occur, I had seen a long article about this case, I had heard counsel say on many occasions, as you have said here today, that you have invited public examination of this case, all I said was that if I should find that the rules were violated, I would take corrective action, which could include dismissing the case.
>
> Now, I was not referring to some mysterious, illusory, ambiguous rule fixed in my mind and known to nobody else. It's obvious I was not saying that, that I was going to take action or not based on a rule that I invented and disclosed to no one.
>
> What was obvious to anyone that what I was saying is that if I found that the rule of professional conduct was violated, that is to say that counsel or parties were making public statements intended to affect the outcome of this case, I would take action.

Plaintiff's understanding of Judge Macdonald's order and Judge Giovan's warning to adhere to the order was clearly demonstrated in her deposition and in the June 26, 2002, television interview that was broadcast on WDIV Channel 4 in which she acknowledged Judge Giovan's warning that dismissal would result if she continued her behavior, but further stated that "it doesn't bother me, because I'm not going to quit fighting against sexual harassment."

Plaintiff's counsel also clearly understood Judge Macdonald's order and Judge Giovan's explicit warning to adhere to the order. The trial court twice explicitly discussed the improper conduct with plaintiff's counsel and warned everyone about the consequences of continuing misconduct. Despite the warning, and despite the approaching trial, plaintiff and her counsel continued the misconduct.[23] In fact, as Judge

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[23] Justice Cavanagh suggests that Judge Giovan's warning not to discuss the excluded conviction with the press was somehow insufficient to convey to the parties that they were not to discuss the excluded conviction with the media. *Post* at 828-830. We strongly disagree. The transcript of this exchange, which we have set forth on pages 9 to 11 of this opinion, makes it quite clear that the parties were advised in no uncertain terms that references to the excluded conviction were to cease. Contrary to Justice Cavanagh's assertion, Judge Giovan explicitly warned the parties and the attorneys that further references to the excluded conviction would result in dismissal. Although Judge Giovan did not embody this warning in a written order, the warning did not consist of "general comments . . . made in passing to both parties." *Post* at 831. Rather, the warning was explicit and made on the record in open court. All involved were clearly aware of what was prohibited. To require a formal written order—as it appears Justice Cavanagh would—would be to permit any litigant or attorney to disregard an explicitly conveyed and clearly understood obligation on the ground that it was not communicated in a written order. Such a rule would lead only to gamesmanship and we decline to adopt it.

Plaintiff was well aware of Judge Giovan's explicit warning to refrain from making public references to the excluded conviction and of the consequences of failing to abide by the warning. Moreover, as demonstrated throughout this opinion, plaintiff failed to abide by the warning on numerous occasions.

Giovan noted, plaintiff's lead counsel, George Washington and Miranda Massie, appeared in television news broadcasts that specifically referred to Bennett's expunged conviction. Moreover, plaintiff's counsel acknowledged that counsel could possibly be violating the expungement statute by publicly disseminating information regarding Bennett's expunged conviction, but stated that it was "worth the risk." Also of note is Ms. Masley's statement at the July 8, 2002, hearing that "Ms. Maldonado has a right to speak about Mr. Bennett's conviction for sure." She further stated that plaintiff and her counsel, depending on how close it was to trial, had the right to publicize evidence that had been excluded by the court.

Judge Giovan properly noted that, notwithstanding the rulings of two judges and the apparent illegality of disclosing Bennett's excluded conviction, nothing would deter plaintiff from continuing to publicize information regarding Bennett's excluded conviction. Plaintiff so admitted in her deposition. Even without an explicit order precluding plaintiff and her counsel from publicizing Bennett's excluded conviction, Judge Giovan chose a principled option in dismissing plaintiff's case in order to protect the administration of justice. The imposition of any lesser sanction would have been unjust in light of plaintiff's and her counsel's flagrant misbehavior.[24]

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[24] Justice Cavanagh suggests that the trial court had "numerous other options" available to it as sanctions apart from dismissal. *Post* at 833. Even if we agreed with this assertion, it is irrelevant in determining whether the sanction actually chosen-dismissal in this case-was within the range of "reasonable and principled outcome[s]." *Babcock*, *supra* at 269, 666 N.W.2d 231. In light of the repeated violation of the court's instruction not to publicize the excluded conviction, we cannot say that Judge Giovan's conclusion that nothing short of dismissal would deter plaintiff and counsel's repeated misconduct was incorrect. As such, even if we were to assume that there were other sanctions available—which we do not necessarily believe to be the case-the sanction of dismissal was clearly within the range of reasonableness under the circumstances.

Not only did plaintiff and her counsel disregard Judge Macdonald's order and Judge Giovan's explicit warning to respect the order, counsel violated numerous rules of professional conduct. Plaintiff's counsel's public references to Bennett's excluded conviction violated MRPC 3.6, which was the basis for Judge Giovan's dismissal. Plaintiff's counsel reasonably knew or should have known that their comments would have a substantial likelihood of materially prejudicing the proceedings by improperly influencing prospective jurors regarding Bennett's propensities to commit sexual harassment, especially since trial was approximately two weeks away.

Plaintiff argues that Judge Giovan improperly relied on MRPC 3.6 in dismissing plaintiff's case. She contends that Judge Giovan's dismissal was solely based on plaintiff's comments, and that MRPC 3.6 does not apply to nonlawyers. Plaintiff correctly argues that the Michigan Rules of Professional Conduct do not apply to nonlawyers, but mistakenly contends that Judge Giovan relied only on her behavior in ordering a dismissal. Plaintiff also erroneously contends that she is free to engage in improper pretrial publicity designed to taint the potential jury pool. The Michigan Court Rules do apply to plaintiff. They authorize the trial court to impose sanctions such as dismissal for party misconduct. MCR 2.504(B)(1). Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald's order, he would dismiss her case. Plaintiff failed to obey this warning and, thus, Judge Giovan properly dismissed her case.[25] In any event, even if plaintiff is not bound by MRPC

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[25] Justice Cavanagh contends that we attempt to portray Judge Macdonald's order excluding Bennett's prior conviction as having the same effect as an order precluding any mention of this evidence in public. We, however, do not misconstrue the order of exclusion as an order precluding any mention of the evidence in public. Rather, we rely on the order of exclusion in concluding that plaintiff's and her counsel's numerous

3.6, plaintiff's counsel's repeated public references to Bennett's excluded conviction, coupled with Ms. Massie's statement five days before trial that "Metro Detroit" judges were biased in favor of the Ford Motor Company, were substantially likely to materially prejudice the proceedings and improperly influence prospective jurors.

Judge Giovan did not reach a conclusion regarding a possible violation of MRPC 3.5, finding it was unnecessary because he dismissed the case under MRPC 3.6. Because Judge Giovan did not rely on this rule in dismissing the case, we need not reach a conclusion regarding a possible violation of the rule. We nevertheless enumerate plaintiff's counsel's acts of disrespect against the trial court to highlight plaintiff's counsel's undignified and discourteous conduct toward the trial court.

Plaintiff's counsel, on numerous occasions, despite court orders and an explicit warning by the trial court, publicly divulged information regarding Bennett's excluded conviction. Plaintiff's counsel also deliberately disregarded the trial court's oral directive to refrain from disseminating information regarding Bennett's excluded conviction. Ms. Masley sarcastically responded to the trial court's questioning at the dismissal hearing, and at one point, while on the stand, turned to members of the "Justice for Justine" committee present in the courtroom and asked them who they voted for in the last judicial election. Additionally, Ms. Massie commented during a July 3, 2002, television interview that "Metro Detroit" judges are biased toward the Ford Motor Company. While this conduct may not amount to a violation of MRPC 3.5, it further justifies Judge Giovan's dismissal for plaintiff's and

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references to the excluded evidence just weeks before trial was to begin constituted premeditated misconduct designed to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice.

her counsel's participation in pretrial publicity designed to taint the jury pool.

We also note MRPC 8.4, although Judge Giovan did not rely on this rule in ordering dismissal. MRPC 8.4 prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. MRPC 8.4(a) prohibits lawyers from engaging in misconduct through the acts of others. Here, plaintiff's counsel not only failed to restrain plaintiff from repeatedly and intentionally publicizing Bennett's inadmissible expunged conviction in order to taint the potential jury pool and deny defendants a fair trial, they participated with plaintiff in the misconduct on numerous occasions. This inappropriate and unprofessional conduct directly violated Judge Macdonald's order, Judge Giovan's reaffirmance of the order, and Judge Giovan's explicit warning. Moreover, this conduct was directly aimed at frustrating the due administration of justice. It also supports the dismissal of plaintiff's complaint.

C. The First Amendment and a Trial Court's Ability to Restrict Speech

The First Amendment guarantees that the freedom of speech shall not be abridged. It states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[U.S. Const., Am. I.]

In *Gentile*, the United States Supreme Court addressed the standard governing the state's ability to discipline an attorney under an ethical rule that is identical in all relevant respects to MRPC 3.6, regarding speech about parties or proceedings in which an attorney is involved. The Court rejected the

petitioner attorney's claim that he should be held to the "clear and present danger" standard applicable to the press, and concluded that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Gentile*, *supra* at 1074, 111 S.Ct. 2720. The Court, in an opinion by Chief Justice Rehnquist, explained:

> We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.
>
> When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. The "substantial likelihood" test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a state's judicial system and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) *comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.*

[*Id.* at 1075, 111 S.Ct. 2720 (emphasis added).]

The Court noted that "[l]awyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074, 111 S.Ct. 2720. The Court further observed that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.* at 1075, 111 S.Ct. 2720.

Judge Giovan, after reviewing *Gentile*, found a substantial likelihood of prejudice:

> More important, however, is that the plaintiff should not be heard to make her argument, which goes like this: "We deny that our behavior was intended to have a substantial likelihood of prejudice. But even if you establish that it was, you cannot dismiss the plaintiff's case until you establish that it has achieved its intended effect."
>
> We believe otherwise. That is not an acceptable standard for preserving the integrity of a court system. The behavior in question has been intentional, premeditated, and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect.

The Court of Appeals acknowledged that the applicable test under *Gentile* is whether the conduct generated a "substantial likelihood" of prejudice, yet remanded for an evidentiary hearing to determine whether "actual" prejudice occurred.

We hereby affirm the trial court's understanding of *Gentile*. Plaintiff's and her counsel's numerous public references to Bennett's inadmissible, expunged indecent exposure conviction, despite a court order excluding such evidence, were obviously intended to prejudice potential jurors. The trial court thus warned the parties and counsel that all public references to the expunged conviction in violation of the ethical rules would result in dismissal. This limitation on plaintiff's and her counsel's speech only applied to speech that was substantially likely to have a materially prejudicial effect and that, therefore, violated the rules of ethics. It did not prohibit plaintiff and her counsel from speaking about sexual harassment or the general nature of plaintiff's case. Judge Giovan, at the dismissal hearing, acknowledged the

importance of upholding the First Amendment and drew a distinction between protected speech and speech merely designed to thwart the judicial process. He stated to defense counsel:

> Well, now, before we move further, I think you understand that we need to draw a distinction between a party's willingness and right to disseminate to the public their ideas of how they've been unjustly treated and the like, and even criticism of the Court as opposed to what's really at stake here, and that is efforts to thwart the judicial system, and that is to disseminate, for example, excluded evidence and evidence forbidden to be disseminated by statute, which you have referred to. But nevertheless, you do need to differentiate between those two things.

The rules of evidence are designed to ensure fairness in the administration of justice, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence. MRE 102. Judge Macdonald's exclusion of Bennett's expunged conviction was based on the rules of evidence. She specifically relied on MRE 404(b) in excluding the evidence, determining that the evidence would not be offered for any purpose other than to show Bennett's propensity to conduct himself in this manner. Judge Macdonald further relied on MRE 403 to determine that, even if the evidence were relevant, its undue prejudice substantially outweighed its probative value in light of the availability of alternative means of proof. Judge Macdonald's ruling, and Judge Giovan's subsequent limitation on plaintiff's and her counsel's speech, was in accord with the purpose of the evidentiary rules. Moreover, the rulings were necessary to protect defendants' fundamental right to a fair trial and were directly aimed at protecting potential jurors from prejudice.

As the United States Supreme Court noted in the *Gentile* case, few, if any, interests are more fundamental than the right

to a fair trial by an impartial jury. Plaintiff stated that nothing would deter her from continuing to publicize Bennett's expunged conviction, and that she would post it on the Internet if she could. Additionally, plaintiff's counsel, despite court orders, publicly divulged information regarding the excluded expunged conviction. Judge Giovan merely exercised his "'affirmative constitutional duty' to minimize the potential for prejudicial pretrial publicity," *United States v. Koubriti*, 307 F.Supp.2d 891, 897 (E.D.Mich., 2004), quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), in dismissing plaintiff's case, and did not violate the First Amendment in doing so.

The Court of Appeals requirement that actual prejudice be shown conflicts not only with the "substantial likelihood" test set forth in *Gentile*, but also with the plain language of MRPC 3.6. Moreover, the Court of Appeals standard has no practical workability. It would be impossible to determine "actual prejudice" to a potential jury pool three years after the incident in question. We decline to order an evidentiary hearing that is no more than a fool's errand. The trial court narrowly tailored a restriction on plaintiff's and her counsel's speech consonant with the Michigan Rules of Professional Conduct. The trial court's limitation on plaintiff's and her counsel's speech was narrowly tailored and necessary to prevent prejudice to the potential jury pool and did not violate the First Amendment.

IV. RESPONSE TO JUSTICE CAVANAGH'S DISSENT

Justice Cavanagh asserts that the majority opinion violates the First Amendment by restricting speech that does not have a substantial likelihood of materially prejudicing the proceedings. We reiterate that the narrow and necessary limitation on plaintiff's and her counsel's speech only applied to Bennett's expunged prior conviction that had been excluded as evidence. Plaintiff and her counsel remained free to discuss the general nature of her case and sexual harassment.

We agree with Justice Cavanagh that the First Amendment does protect even offensive expressions, see, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The First Amendment, however, does not protect all speech in whatever circumstances. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). The United States Supreme Court has recognized the need to balance the rights of attorneys and litigants in pending cases and the state's interest in fair trials. In recognizing this tension, the Court has held that the First Amendment does not protect speech that has a substantial likelihood of materially prejudicing the proceedings. Contrary to Justice Cavanagh's implication that plaintiff is being punished for being discourteous and offensive toward the court, we affirm the dismissal of plaintiff's case solely because plaintiff and plaintiff's counsel made numerous references to excluded evidence, despite the trial court's oral warning that dismissal would result if such references continued, for the sole purpose of tainting the potential jury pool and denying defendants a fair trial.

Justice Cavanagh opines that plaintiff's and her counsel's references to the excluded evidence did not have a substantial likelihood of materially prejudicing the proceedings. We, however, fail to see how plaintiff's and her counsel's numerous public references to Bennett's prior indecent exposure conviction, after the court ordered the exclusion of that evidence, did not have a substantial likelihood of materially prejudicing this sexual harassment proceeding. The excluded indecent exposure conviction, which was subsequently expunged, involved sexual behavior that is very similar to the alleged sexual behavior in this case. It could be offered for no other purpose than to show Bennett's propensity to conduct himself in this manner. This is the exact type of evidence that MRE 404(b) precludes. If the narrow limitation on speech in this case cannot pass muster under the substan-

tial likelihood test of *Gentile*, we fail to see what limitation could survive.[26]

V. CONCLUSION

We conclude that the trial court did not abuse its discretion in dismissing plaintiff's suit. We further hold that the trial court's explicit warning prohibiting any references to Bennett's excluded conviction did not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order dismissing plaintiff's case. Because we hold that a dismissal is appropriate, we need not decide the remaining issue. Additionally, we do not reach the issues in plaintiff's cross-application because they are moot in light of our reinstatement of the trial court's order of dismissal.

CLIFFORD W. TAYLOR, ROBERT P. YOUNG, JR., STEPHEN J. MARKMAN, *JJ.*, concur.

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[26] To reiterate, as stated in *Grievance Administrator v. Fieger*, 476 Mich. ----, ----; 719 N.W.2d 123, 2006 WL 2129841 (Docket No. 127547), decided July 31, 2006, slip op. at 34 n. 34:

> Given the position advanced by the dissenting justices . . . , one wonders whether the dissenting justices would simply surrender the legal process to the least restrained and worst behaved members of the bar. With increasingly little need to adhere to the rules necessary to ensure public confidence in the integrity of the legal process, the dissenters would create a world in which legal questions come increasingly to be decided, not by a fair and rational search for truth, but by bullying and uncivil behavior, personal abuse, one-upmanship, and public exhibitionism on the part of those who are custodians of this system, the bar. Justice under the law cannot flourish within such a system.

MICHAEL F. CAVANAGH, J. (*dissenting*).

I agree with the majority that a trial court has the authority to control courtroom proceedings; however, this control must comport with the First Amendment. The desire for "preserving an organized polity," *ante* at 810, cannot be exercised at the expense of an individual's First Amendment right to free speech. Because I believe that the trial court abused its discretion when it dismissed plaintiff's case with prejudice and because I vehemently disagree with the majority's belief that its opinion today does not violate the Constitution, I must respectfully dissent. Further, because I agree with Justice Weaver that the majority's decision undermines the basic tenets of our judicial system, I also concur with her dissent.

I. THE STANDARDS FOR REVIEWING THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS

Plaintiff Justine Maldonado's cause of action for sexual harassment against Daniel Bennett and defendant Ford Motor Company was dismissed with prejudice on August 21, 2002, because the trial court believed that plaintiff and her attorneys engaged in prejudicial pretrial publicity. The Michigan Rules of Professional Conduct (MRPC) have an established court rule that specifically governs trial publicity. MRPC 3.6 states:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer *knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.*

[Emphasis added.]

The United States Supreme Court examined the "substantial likelihood of material prejudice" standard in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115

L.Ed.2d 888 (1991), in light of the First Amendment.[1] The Supreme Court observed that this standard "imposes only narrow and necessary limitations on lawyers' speech." *Id.* at 1075, 111 S.Ct. 2720. As the Supreme Court has also noted, "the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press." *Bridges v. California*, 314 U.S. 252, 262, 62 S.Ct. 190, 86 L.Ed. 192 (1941). The evil must be substantial and "extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263, 62 S.Ct. 190.

II. THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS WAS NOT SUBSTANTIALLY LIKELY TO MATERIALLY PREJUDICE THE TRIAL

The conduct of plaintiff and her attorneys was not substantially likely to materially prejudice the trial. When plaintiff filed her sexual harassment cause of action, the *Detroit Free Press* published an article about the filing on June 9, 2000. Plaintiff also held a press conference about the filing of her complaint. From that time forward, Bennett's indecent exposure conviction was a matter of public record, available to any member of the public, including any journalist.

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[1] The United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. [U.S. Const., Am. I.]

The Michigan Constitution provides:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press. [Const. 1963, art. 1, § 5.]

Long before Bennett's indecent exposure conviction was ultimately expunged on November 9, 2001, and the trial court made a general statement to the parties about pretrial publicity on June 21, 2002, the indecent exposure conviction and the facts surrounding it were well-publicized. Accordingly, it is improper to blame plaintiff and her attorneys for every subsequent mention of Bennett's indecent exposure conviction, as the majority has, because information about his conviction was available from numerous sources. Journalists had access to this information from the time the complaint was filed, and journalists attended public courtroom proceedings, as they are allowed to do. Police reports were readily available to anyone who properly requested them. This information was contained in pleadings in the circuit court, the Court of Appeals, and this Court, and no objection was made. Further, the indecent exposure conviction was repeatedly discussed in open court. So regardless of whether plaintiff was the original provider of the information, any novice journalist willing to do a nominal amount of research would have ultimately discovered the conviction. See, e.g., *Gentile*, *supra* at 1046, 111 S.Ct. 2720 (Kennedy, J.) (Although the petitioner shared the information with journalists, it was also "available to any journalist willing to do a little bit of investigative work.").

Over seven months after information about Bennett's indecent exposure conviction was first made known in relation to this case, on January 19, 2001, Judge Kathleen Macdonald granted a motion to exclude evidence of Bennett's indecent exposure conviction from plaintiff's trial.[2] Later, on February

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[2] Notably, Judge Macdonald recognized that this decision may not be final. She stated the following:

> My ruling *right now* is that it [evidence of Bennett's indecent exposure conviction] will not be allowed even as to notice to Ford Motor. *That's my position now.* However, whenever I make a ruling in a vacuum outside the context of a trial, I'm always concerned

16, 2001, the trial court granted a motion to exclude any evidence related to Bennett's indecent exposure conviction. However, *these decisions did not preclude plaintiff and her attorneys from ever mentioning the indecent exposure conviction in public again*, and it is erroneous to attempt to portray them as such. While the majority refers to an order by Judge Macdonald that witnesses who mentioned Bennett's indecent exposure conviction would be considered in contempt of court, this order applied to *Lula Elezovic's case*, not plaintiff's case, and the order applied only to testimony given in court. This order did not restrict *plaintiff's* right to discuss Bennett's indecent exposure conviction in public settings as it relates to her case.

Notably, in between the two decisions excluding evidence of Bennett's indecent exposure conviction, on January 28, 2001, the *New York Times* published a lengthy article about the multiple claims of sexual harassment at defendant's plant. The article also mentioned Bennett's indecent exposure conviction, including a reference to the indecent exposure conviction made by the former plant manager for defendant's Wixom plant. Another article was published on June 12, 2002, in the *Metro-Times*. In the article, plaintiff is quoted as saying, "They are investigating everything in my life, but not the man who did it to me, not the man who had the criminal record, was in a company car and exposed himself to high-school girls and was convicted of it." However, the article also stated that "[a]ccording to Ford and Bennett's attorney," plaintiff began weaving her tale after she learned of Bennett's

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that when I get in the middle of the trial and I find out I may have made a mistake, I will change my ruling. If I find the probative value of this evidence against only Ford Motor and somehow I can make a limited instruction so that somehow the jury won't take it as propensity evidence, *I would reconsider it. As of right now this evidence is excluded.* [Emphasis added.]

indecent exposure conviction.[3] Bennett's attorney also talked about Bennett's indecent exposure conviction in the article, as well as how Bennett was falsely accused by the girls and how the conviction was expunged. Bennett's conviction was also mentioned by the attorney for Lula Elezovic, a woman who also alleged that Bennett sexually harassed her; Pamela Perez, another woman who alleged that Bennett sexually harassed her; and a former plant manager for defendant. While the majority contends that it was proper for the trial court to dismiss plaintiff's case with prejudice for mentioning Bennett's indecent exposure conviction, it conveniently ignores the fact that *defendant's attorney and Bennett's attorney also did the same* to advance their theory of the case to the public.

On May 17, 2002, another evidentiary hearing was held in front of Judge William Giovan.[4] At a conference in chambers, defendant's attorney requested a gag order directing plaintiff's attorneys not to publicize Bennett's expunged indecent exposure conviction. The court *declined to issue a gag order.*

In the course of another evidentiary hearing on June 21, 2002, the trial court briefly stated that it would dismiss the case if it found that a party was "causing some difficulty in

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[3] The majority characterizes these remarks as necessary responses to comments made by plaintiff and her attorneys. *Ante* at 814 n. 11. The majority believes that saying that plaintiff is a lying opportunist who crafted her story after learning of the indecent exposure conviction is "not intended to taint the potential jury pool and cause prejudice to plaintiff." *Id.* I, however, believe that an objective reader of the facts of this case will recognize an analytical disparity in the majority's reasoning. Simply, if mentioning Bennett's indecent exposure conviction is-as the majority asserts-an attempt to influence the jury pool, then publicly arguing that plaintiff fabricated claims of sexual harassment in a desperate attempt to receive a large cash award from defendant is *exactly the same type of conduct that the majority finds so egregious.*

[4] Judge Giovan was assigned to the case after Judge Kathleen Macdonald was assigned to another division of the circuit court.

our getting a fair jury . . . ." Yet this "explicit warning," as the majority repeatedly calls it, was so vague and fleeting that it cannot possibly take the place of a formal court order. It provided no guidance to the parties about what conduct was prohibited and clearly made no specific mention of Bennett's expunged conviction. Moreover, because the conviction had been previously referenced in the media and the trial court had *refused to issue a gag order to prohibit this conduct*, there can be no fair inference drawn from the trial court's offhand comment that it was now prohibiting any mention of the conviction.

It is important to note that the entire exchange about the possibility of dismissal occurred in an offhand manner as follows:

> *Mr. Morgan* [*Bennett's counsel*]: But first, they tried Mr. Bennett's deposition, and they unilaterally scheduled it for the 12th, knowing that they had fed the Metro Times with all the information for that horribly one-sided, inflammatory article that came out—[5]
>
> *The Court:* You think it was one-sided?
>
> *Mr. Morgan:* I haven't heard anyone comment to me to the contrary in the past week and a half.
>
> *The Court:* I will just tell you that I don't know who it was, but somebody thought that it made a fair presentation. That's neither here nor there, if that makes you feel any better.

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[5] Part of this "one-sided" article states as follows:

> Perhaps the plaintiffs are colluding to pick Ford's pockets. And perhaps Maldonado is the woman Ford portrays her to be-a greedy, sexually wanton, emotionally troubled ringleader of a conspiracy to gouge the company.

Or perhaps she and the other women are telling the truth.

Mr. Morgan: Well, the night before, and my client was ready to appear for the deposition in the *Perez* case. We had filed a motion for a protective order that we had scheduled for the previous Friday, and that motion for a protective order was, number one, to have the judge limit—

The Court: But, you know, since you mentioned that article, where's this coming from? I thought that there is a prohibition against counsel speaking to-making public statements designed to affect litigation.

Ms. Hardy [*defendant's counsel*]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.

The Court: Is counsel being quoted in this?

Mr. Washington [*plaintiff's counsel*]: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie [plaintiff's attorney] and I were both quoted, all quoted.

The Court: I'm not sure-well—

Ms. Hardy: It was initiated, without doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning this expunged conviction so that some way, somehow, irrespective of this Court's ruling—

The Court: I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair

> jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.

[Emphasis added.]

Contrary to the majority's assertions, the trial court did not advise the parties "in no uncertain terms that references to the excluded conviction were to cease." *Ante* at 820 n. 23. And the trial court did not "explicitly warn [ ] the parties and the attorneys that further references to the excluded conviction would result in dismissal." *Id.* In fact, there was no "explicit warning" that the case would be dismissed if remarks about the conviction were made, and there was no warning about what conduct would result in dismissal. A review of the quoted transcript of the exchange reveals that *not once* does the trial court even utter a word about the expunged indecent exposure conviction or excluded evidence.

Remarkably, I need only quote the trial court's own words to show the falsity of the majority's position that the trial court "explicitly warned the parties that [it] would dismiss the case if the inappropriate remarks regarding the excluded conviction continued." *Ante* at 820. The trial court itself stated, "I told everybody then [at the May 17 hearing], certainly in chambers and maybe again after that on the record, I don't know that I repeated it on the record, that *I had no intention of telling anyone what they can say.*" (Emphasis added.) At another hearing, the trial court stated, "I think I don't have the right to decide for myself what a lawyer can say to the public. I do not have that right." And finally and most importantly, "I have never issued such an order in my life." Therefore, I fail to see how the majority can characterize the trial court's words as being an "explicit warning" when the trial court itself does not believe it issued such a warning.

The trial court's own statements that it did not issue an order or warning that explicitly restricted what could be said should persuade a reasonable reader that no such order was entered or warning issued that prohibited the mention of the indecent exposure conviction. Yet the majority chooses to ignore this reality in favor of a factual scenario that it created and that it *wishes* had occurred. The majority attempts to portray an order excluding evidence from trial as having the same effect as an order precluding any mention of this evidence in public, and this erroneous portrayal is the crux of the majority's analysis. Remarkably, the majority's entire analysis relies on the faulty premise that two orders-one of which was never even entered-dealing with different topics and restricting different conduct can actually be the same. But an order excluding evidence is not magically transformed into an order precluding the mention of the evidence in public no matter how much the majority wishes it were so. Unfortunately, I believe that the majority has steadfastly refused to acknowledge the difference because it would show that its analysis is insupportable.

While the majority labels as "preposterous" the dissent's position that an order excluding evidence from a trial is not the same as an order precluding the mention of this evidence in public, the majority never goes beyond name-calling to explain its position that an order excluding evidence now means that this evidence can never be mentioned in any forum again. Unfortunately, the majority's insistence on resorting to such tactics and its refusal to explain its position is becoming standard operating procedure whenever the majority cannot legally support its position. In this case, the majority so desires a specific outcome that it ignores the fact that an order excluding evidence cannot be labeled an order precluding mention of this evidence in public, and this blind adherence to its favored outcome leads it to espouse a position that is completely indefensible.

Moreover, the trial court's brief remarks at the evidentiary hearing about ethical obligations were made with no hearing or information about what plaintiff and her attorneys had or had not been doing. There is no indication that the trial court believed that plaintiff and her attorneys had been engaging in misconduct and that they must now cease any of their activities. The trial court's general comments were made in passing to both parties. *There was no formal or informal hearing on this matter*; there was only an extremely brief exchange. Also, contrary to the majority's contention, a comment made by plaintiff at a rally protesting sexual harassment is not adequate evidence that plaintiff understood the trial court's June 21, 2002, "order." In response to a reporter's question at the rally, plaintiff stated that she was not going to quit fighting sexual harassment, even if that meant that her case would be dismissed. However, the news report does not show the question posed by the reporter that prompted plaintiff's statement. Notably, there was *no* mention of Bennett's expunged conviction during this news broadcast. What was mentioned during the broadcast was a statement by a spokeswoman for defendant, in which she said that she would not comment on the case, but she did note that the judge had asked those involved to refrain from drawing attention to the case. While the majority draws the conclusion from the broadcast that plaintiff somehow understood a limitation on referencing Bennett's expunged conviction when no such limitation was ever ordered or discussed by the trial court, I draw no such conclusion. It is highly probable that plaintiff was referring to the same directive that defendant's spokeswoman was referencing-that the trial judge asked the parties to refrain from drawing *unnecessary* attention to the case. But there is no indication that such a vague "request" was somehow transformed into an "order" re-

garding referring to Bennett's expunged conviction merely by plaintiff's comment.[6]

As it relates to the conduct of plaintiff's attorneys, the majority states that it was misconduct for plaintiff's attorneys to have "appeared in television news broadcasts that specifically referred to Bennett's expunged conviction." *Ante* at 821. Yet, in over ten televised news reports, plaintiff and her attorneys do not once mention Bennett's indecent exposure conviction or the events that led to the conviction. Notably, the only person to comment off-camera on the conviction in one of the news reports is a spokesperson for *defendant*. Further, while the 1995 conviction is referenced in various televised news reports, an attorney for Bennett or defendant appears in each one of these reports. If it was misconduct for plaintiff's attorneys to appear in these reports, I fail to see why defendant is not being held to a similar standard.

I further note that, in a September 12, 2001, article by The Associated Press, it is *Bennett's* attorney who mentions the indecent exposure conviction, not plaintiff's attorneys. In an October 10, 2001, article in the *Detroit Free Press*, it is again Bennett's attorney who mentions the indecent exposure conviction as he characterizes plaintiff and the other women who allege sexual harassment by Bennett as women who are lying, looking for easier jobs, "out to make a quick buck," and attempting to capitalize on Bennett's indecent exposure conviction.

Notably, "in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts." *Gentile*, *supra* at 1058, 111 S.Ct. 2720 (Ken-

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[6] Plaintiff's counsel later even sought more specificity and argued that the trial court's request was too vague to provide any guidance because "there's no way that any member of [plaintiff's] legal team could know when you had drawn a conclusion, as you said, that we were running afoul of the ethical rules . . . ."

nedy, J.). "[A]n attorney may take reasonable steps to defend a client's reputation . . . ." *Id.* at 1043, 111 S.Ct. 2720. In this case, defendant made numerous comments to the media regarding plaintiff and her claims of sexual harassment. Bennett's and defendant's strategy was clear. Plaintiff was a liar. Bennett's attorney made repeated, explicit statements to the media-plaintiff and the other women who alleged sexual harassment were lying. Defendant's attorney stated that plaintiff had "credibility issues." In the June 12, 2002, *Metro-Times* article, Bennett's attorney said that plaintiff and the other women suing defendant and Bennett were lying about the harassment and were motivated in large part by greed. Defendant's defense was summarized as being that "Maldonado is an overweight opportunist who is colluding with co-workers to make a fortune by falsely accusing Bennett of sexual harassment and falsely accusing the company of doing nothing about it." Pretrial allegations against Maldonado included an assertion that she had had sex in a car in defendant's parking lot and frequently took her underwear off at work and hung it for all to see. And defendant's attorney repeatedly attempted to trivialize testimony and evidence that other women had been sexually harassed by Bennett by referring to this as "me too" evidence.

In light of the forceful and contentious tactics engaged in by both parties, I do not believe that the mere mention of an *expunged* conviction of indecent exposure that *some jurors might hear* had a substantial likelihood of materially prejudicing the trial. See, e.g, *Gentile*, *supra* at 1058, 111 S.Ct. 2720 (Statements made by an attorney alleging that the police department and the prosecutor's office were corrupt were not substantially likely to materially prejudice the proceedings.). It is not surprising that *defendant* would make this argument because it would like as little attention as possible paid to this case because it finds itself defending yet another sexual harassment claim involving Bennett. What is surprising, however, is that the majority agrees with defendant and takes

the position that dismissal with prejudice is a reasonable response for the courts in a matter in which plaintiff and her attorneys have behaved in a manner *entirely consistent* with the actions of defendant's attorneys.

Simply, if plaintiff and her attorneys are criticized for seeking to influence the public perception of events by talking about Bennett's indecent exposure conviction, then I fail to see how defendant's attorneys were not attempting to do the same. Both parties sought to negatively portray their adversary's position in the media. While plaintiff is criticized by the trial court for sending out a press release, defendant also sent out press releases involving this case, yet it is only plaintiff who is being penalized with the extreme sanction of dismissal with prejudice.[7]

The attention paid to this case unmistakably shows that public interest is going to be more acute when the matter at issue is controversial. See *Bridges*, *supra* at 268, 62 S.Ct. 190. Sexual harassment, and, in this case, its alleged pervasiveness at defendant's facilities, is a matter of public interest that will engender public discussion.[8] As the *Detroit Free Press* reported in an October 10, 2001, article, various women complained of sexual harassment at defendant's Wixom plant, including women who were high-level supervisors. In the article, a manager for the Michigan Department of Civil

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[7] I also note that after investigating this matter, the state of Michigan's Attorney Grievance Commission did not find any evidence of misconduct that warranted further action, and it dismissed complaints filed by Bennett's attorney against plaintiff's attorneys.

[8] Other women have also alleged sexual harassment involving Daniel Bennett. Notably, this Court has issued two other opinions involving similar allegations against Bennett. See *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 697 N.W.2d 851 (2005); *McClements v. Ford Motor Co.*, 473 Mich. 373, 702 N.W.2d 166 (2005). Further, a majority of this Court addressed by order another case dealing with alleged sexual harassment by Bennett. *Perez v. Ford Motor Co. No 2*, 474 Mich. 1057 (2006).

Rights stated, "'It's an extraordinary situation when you've got that many [sexual harassment complaints] . . . . Filing a lawsuit is not something women take lightly.'"

Making this case an even bigger issue of public interest is the manner in which the judicial proceedings are conducted, and the allegation, supportable or not, that participants are not receiving fair treatment in our courts. The public undoubtedly has an interest in ensuring that proceedings are conducted fairly. But punishing comments made while the case is pending will "produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height." *Bridges*, *supra* at 268, 62 S.Ct. 190. It is axiomatic that under the majority's rationale, cases that command the most public interest will be removed from the arena of public discourse. See *id.* It may take years to resolve a case, and the majority's position effectively silences negative critiques of the justice system and its parties during that time. *Id.* With this, I cannot agree.

III. OTHER ADEQUATE AVENUES WERE AVAILABLE TO THE TRIAL COURT

The trial court had numerous other options to use before employing the drastic measure of dismissing plaintiff's case with prejudice. The possibility that other less extreme measures could have been used by the trial court is a weighty factor that must be considered See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). The trial court could have required a continuance; moved the location of the trial; continued forward with sequestered, individualized voir dire; or continued forward with voir dire and a larger pool of jurors. See, e.g., *Gentile*, *supra* at 1044, 111 S.Ct. 2720 (Kennedy, J.). At the very least, the trial court could have issued an *order* forbidding any future disclosure by the parties of Bennett's indecent exposure conviction. There is no record that any of these options were seriously considered by the trial court.

The majority appears to argue that plaintiff would not comply with such an order. But plaintiff's sarcastic and posturing comments to defense counsel that she had told people about the conviction and would continue to do so cannot seriously be deemed evidence from which it can be extrapolated that plaintiff would refuse to comply with an order *from the court.* Notably, it is clear that the trial court never thought it issued an order to any of the parties. The trial court stated:

> I don't believe in gag orders. I've never issued a gag order. . . . I have heard from time to time judges issuing orders personal to the attorneys saying you can't talk about this case, you can't do this, you can't do that. I have never issued such an order in my life. . . . I haven't done it in thirty years and I didn't do it in this case.

[Emphasis added.]

Moreover, defendant's attorney knew that an order was not entered. During a motion hearing, defendant's attorney reiterated the court's comment during a prior hearing that "you were not issuing an order. . . ." During the same hearing, Bennett's attorney also said that he had asked the court to issue an order, but the court had declined. And in any event, whether plaintiff theoretically would comply with such an order is unfounded speculation. The critical fact is that plaintiff is suffering the ultimate punishment for violating an alleged "order" that was never even issued.

To fully understand this case and any comments made by plaintiff, it is important to note that during her deposition, plaintiff endured days of questioning. At one point, her attorneys even filed a motion for a protective order barring further deposition questioning of plaintiff. Plaintiff was questioned about her weight and her Internet habits. Evidence was sought and plaintiff was also questioned about her sexual fantasies, prior sexual assaults, sexual habits, and

religious beliefs, as well as her brother's drug addiction and her father's criminal past. This case was highly contentious with defense counsel repeatedly claiming that plaintiff was lying so that she could receive a damages award. Plaintiff's statement of defiance to opposing counsel cannot reasonably be deemed dispositive evidence that she would continue to discuss excluded evidence if ordered not to do so by the court. While I do not condone disrespectful behavior during depositions or during any aspect of a proceeding, plaintiff's response was a human, albeit inadvisable, response in light of the contentious proceedings. But the statement did not rise to such a level that her case should be dismissed with prejudice because she made it, and I vehemently disagree with the majority that doing so was within the range of reasonable and principled outcomes at the trial court's discretion.

Remarkably, the trial court expressed no real concern about the ability of jurors to impartially decide this case. During a hearing to decide defendant's motion to dismiss, the trial court stated it was not listening to arguments to determine if the conduct of plaintiff and her attorneys impaired defendant's right to a fair trial. The trial court stated, "I think it is often possible in high publicity cases to-you know, with appropriate safeguards, to try a case without—it may be difficult sometimes—without the publicity infecting the trial." Defendant's attorney agreed that the gravamen of the proceeding was about the "alleged misbehavior" of plaintiff and her attorneys in publicizing material and it was not whether defendant could receive a fair trial.

The majority now wants to portray this case as being about a defendant's right to a fair trial. See *ante* at 811. It claims that the "trial court's limitation on the speech of plaintiff and her counsel was a narrow and necessary limitation aimed at protecting potential jurors from prejudice." *Ante* at 811. But I fail to see how *necessary* it was when the trial court itself did not even consider this as a reason for dismissing the case with

prejudice. While the majority now wants to portray this case as being about a defendant's right to a fair trial because this portrayal better supports the majority's outcome, I find this depiction to be disingenuous at best because neither the trial court nor defendant itself viewed the case in this way.

IV. THE CONDUCT OF PLAINTIFF AND HER ATTORNEYS DID NOT VIOLATE MRPC 3.5 AND MRPC 8.4

The majority states that the trial court did not rely on MRPC 3.5 and MRPC 8.4 in reaching its conclusion to dismiss plaintiff's case. However, the majority nonetheless examines the conduct of plaintiff and her attorneys in light of these rules to provide further evidence that the conduct warranted dismissal of plaintiff's sexual harassment cause of action. MRPC 3.5 states the following:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or
>
> (c) engage in undignified or discourteous conduct toward the tribunal.

Regarding MRPC 3.5, the majority refers to a "sarcastic" comment made by one of plaintiff's attorneys to the trial court. Further, the attorney also made a comment during a television interview that it was hard for a plaintiff to get a fair trial when the defendant is a large company like Ford Motor Company. This comment stemmed from plaintiff's filing of an emergency motion for disqualification of the trial judge because, in part, a member of the firm representing defendant who had entered appearances in the matter for defendant was the reception chairperson for a "gala campaign reception"

fundraising event for the judge at the Opus One Restaurant in Detroit. After failing to get plaintiff's attorney to disclose who shared the invitation with her and when, the trial judge refused to disqualify himself and then issued an order denying plaintiff's motion to dissolve the order excluding evidence related to Bennett's 1995 conviction. And later, on August 21, 2002, the trial court dismissed plaintiff's case with prejudice because it claimed that plaintiff and her attorneys had engaged in prejudicial pretrial publicity.

"There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile*, *supra* at 1034, 111 S.Ct. 2720 (Kennedy, J.). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). This includes "the manner in which government is operated or should be operated, and all such matters relating to political processes." *Id.* at 218-219, 86 S.Ct. 1434. In *Gentile*, *supra* at 1033-1034, 111 S.Ct. 2720 the defendant was an attorney who held a press conference that criticized the state for indicting his client and not indicting members of the police department, who he referred to as "crooked cops." This speech was protected by the First Amendment. *Id.* at 1058, 111 S.Ct. 2720.

People may disagree about whether the comment by plaintiff's attorney about the bias of "Metro Detroit" judges was rude or forthright, crude or candid. The statement could even be deemed unjustifiable. However, it was within the attorney's constitutional rights to make the statement. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." *Bridges*, *supra* at 270, 62 S.Ct. 190. The essence of the right to free speech is

that it gives the speaker the opportunity to express the speaker's viewpoints, valid or not. The citizens of Michigan are intelligent and do not need speech to be sanitized. It does not advance the ideals of the justice system to shelter the public from comments, even those that may be deemed unwarranted by some.

Moreover, there is nothing inherently undignified or discourteous in criticizing a court's decisions. In fact, a judge should expect these critiques as a "judge must expect to be the subject of constant public scrutiny." See *Code of Judicial Conduct, Canon 2(A)*. But even if an attorney behaves in a manner that is deemed undignified or discourteous, then sanctions can be imposed against the *attorney*. Indeed, if every attorney who complained about a court's ruling had his client's case dismissed, the dockets of our state's courts would be cleared almost immediately.

At the outset of its opinion, the majority expresses a concern about "preserving an organized polity." *Ante* at 810. And I must note that I do not dispute that it would certainly be easier for a trial court to handle proceedings if there were no fear of criticism for its rulings. However, the ease of a trial court in managing its day-to-day affairs is not sufficient to infringe on plaintiff's First Amendment rights in this case. Our citizens' constitutional right to free speech does not exist merely when it falls within the majority's narrowly defined "orderly" parameters. The First Amendment exists to protect speech-discourteous, disorderly, and sometimes downright offensive. "Freedom" is the first and foremost concern protected by the First Amendment, not order. The majority has offered nothing more than conjecture that the actions of plaintiff would impinge on the parties' right to a fair trial, but the lack of any real concern about a fair trial is particularly obvious when one considers that the *trial court itself did not have such a concern*. The majority further ignores that before speech can be punished, it must be determined to have a

substantial likelihood of *materially* prejudicing the proceedings. See MRPC 3.6. Trial court proceedings are not protected by restricting an individual's right to criticize those very same proceedings.

Regarding MRPC 8.4, the rule states the following:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice;
>
> (d) state or imply an ability to influence improperly a government agency or official; or
>
> (e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

The majority states that plaintiff's counsel did not restrain plaintiff from publicizing Bennett's indecent exposure conviction and that plaintiff's attorneys participated with plaintiff in this "misconduct" on numerous occasions. The majority refers to MRPC 8.4(a), but I fail to see how plaintiff's attorneys engaged in misconduct through the acts of plaintiff. There is no evidence that plaintiff's attorneys counseled her to speak about Bennett's indecent exposure conviction. And I disagree that participating in a rally—a time-honored tradition in this country-and speaking to the media constitute "misconduct" that warrants dismissal of plaintiff's case with prejudice.

Finally, the majority states that remanding for an evidentiary hearing about the specifics of the conduct of plaintiff and her attorneys is "no more than a fool's errand" that it refuses to engage in. *Ante* at 825. While I disagree that the conduct of plaintiff and her attorneys had a substantial likelihood of materially prejudicing the trial, I fail to see what is foolish about remanding to specifically determine what happened, when, and why. When a person's First Amendment rights are at stake and the extreme sanction of dismissing a cause of action with prejudice has been ordered, the majority's steadfast refusal to examine the facts in light of the timetable of events is troubling to say the least.

V. CONCLUSION

The First Amendment does not exist merely to protect courteous and genteel speech. The First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges*, *supra* at 263, 62 S.Ct. 190. Today, I believe that the majority has ignored the mandates of the Constitution in an ill-advised and unnecessary attempt at maintaining "order" in our courts. I believe that the comments of plaintiff and her attorneys fall well within the parameters of the First Amendment. Accordingly, I respectfully dissent and would affirm the decision of the Court of Appeals.

ELIZABETH A. WEAVER, MARILYN J. KELLY, *JJ.*, agrees.

WEAVER, J. (*dissenting*).

The majority's assertion that its decision today is "[a]t the heart of preserving an organized polity" is false. *Ante* at 810. I concur fully in Justice Cavanagh's dissent because I agree that the circuit court's dismissal of plaintiff's case violated her First Amendment right to free speech.

In addition to the First Amendment violation, I write to explain that the premise of the circuit court's dismissal of plaintiff's case had no legal validity and, therefore, the majority's acrobatic effort to justify its decision to affirm the circuit court's order does not preserve an organized polity, it undermines it.

An organized polity is governed by the law and is preserved by courts that apply the law and objectively state the facts. In this case, the circuit court did not establish a legal foundation for its dismissal of plaintiff's case, it acted on a whim. The circuit court's decision was, therefore, an abuse of discretion. Now, the majority legitimizes the circuit court's order by misstating the facts of the case and misapplying the law. The majority's decision abuses this Court's appellate review power and, therefore, is inconsistent with the preservation of an ordered polity.

The circuit court in this case dismissed with prejudice plaintiff Justine Maldonado's sexual harassment action against defendant Ford Motor Company and Ford's employee, defendant Daniel P. Bennett. The circuit court premised its dismissal on pretrial publicity that it attributed to plaintiff and plaintiff's lawyers and referred to defendant Bennett's prior conviction for indecent exposure in an unrelated case. The circuit court found that the publicity violated the Michigan Rules of Professional Conduct, MRPC 3.6. The Rules of Professional Conduct govern the conduct of lawyers. MRPC 3.6 prohibits lawyers from making extrajudicial statements about a case that might materially prejudice judicial proceed-

ings. Despite the fact that MRPC 3.6 only applies to the conduct of lawyers and the fact that there is no evidence that her lawyers violated the rule, the circuit court opined that Ms. Maldonado's activities could be imputed to her lawyers and dismissed the case.

The question presented is whether the circuit court's dismissal with prejudice of Ms. Maldonado's case was an abuse of discretion. I would hold that it was an abuse of the circuit court's discretion to dismiss plaintiff's case for the reasons set forth below, and for those stated well by Justice Cavanagh in his dissent.

I

Because the majority mischaracterizes facts pertinent to understanding this case, the following time line lists the important dates and events in this case's history:

- June 9, 2000: Ms. Maldonado files her sexual harassment cause of action.
- June 9, 2000: The *Detroit Free Press* publishes an article referring to defendant Bennett's unrelated indecent exposure conviction. The pending case, including statements about the case by both sides, is regularly in the media thereafter.
- January 19, 2001: Judge Kathleen Macdonald grants the motion to exclude from plaintiff's trial evidence of defendant Bennett's prior and unrelated indecent exposure conviction.
- February 16, 2001: Judge Macdonald enters an order excluding from plaintiff's trial evidence of defendant Bennett's prior and unrelated indecent exposure conviction.
- September 11, 2001: Plaintiff's lawyers issue a press release referring to defendant Bennett's prior and unrelated conviction for indecent exposure.

- November 2001: Defendant Bennett's prior and unrelated conviction for indecent exposure is expunged.
- June 21, 2002: During a hearing regarding the motion to dissolve Judge Macdonald's order to exclude evidence of the expunged and unrelated indecent exposure conviction, Judge William Giovan warns the parties about pretrial publicity and states that if a party violates some ethical obligation, the case could be dismissed.[1]
- July 3, 2002: During a hearing on plaintiff's motion for Judge Giovan's disqualification, Judge Giovan states on the record that his prior warning was *not a court order.*
- August 21, 2002: During a hearing on defendant's motion to dismiss the case, defendant's attorney states that the case was in the news again. Judge Giovan dismisses the case with prejudice.

II

The circuit court did not establish a legal foundation to support its dismissal of Ms. Maldonado's case. The court

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[1] Specifically, Judge Giovan said:

> I'm making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment.

The majority incorrectly characterizes this warning by suggesting that "Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald's, order he would dismiss her case." *Ante* at 822. Contrary to the majority's characterization, the warning issued by Judge Giovan simply warned the parties to not violate any ethical obligation. Judge Macdonald's order only excluded the evidence from trial, not the public forum.

based its dismissal of Ms. Maldonado's case on her and her attorneys' alleged violation of the Michigan Rules of Professional Conduct, MRPC 3.6. The violation identified by the circuit court involved pretrial publicity by Ms. Maldonado and her attorneys regarding defendant Bennett's prior conviction for indecent exposure, which Judge Giovan suggested violated Judge Macdonald's order to exclude that evidence from trial.

The circuit court's attempt to hold Ms. Maldonado responsible for a violation of MRPC 3.6 is unsupportable. MRPC 3.6 only applies to lawyers. The rule states:

> A *lawyer* shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the *lawyer* knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

[Emphasis added.]

Judge Giovan's opinion reveals that he was aware that MRPC 3.6 does not apply to nonlawyers. Nevertheless, he concluded that a nonlawyer client "is not immune for knowingly doing what [her lawyers] cannot." MRPC 3.6 does not apply to nonlawyers; therefore, it was an abuse of discretion to base the dismissal of Ms. Maldonado's case on her violation of a rule that does not apply to her.

Further, Judge Giovan failed to identify any violation of MRPC 3.6 by Ms. Maldonado's attorneys that warrants dismissal of the case. Judge Giovan noted that her lawyers "appeared in television news broadcasts that made specific references to Mr. Bennett's criminal conviction." However, Judge Giovan did not identify a specific instance when the lawyers themselves mentioned the conviction in these broadcasts or publications. My review of the record reveals that the lawyers did not themselves refer to the conviction.

It is true that one year before Judge Giovan heard the defendant's motion to dismiss and two months before defendant's prior conviction was expunged, the law firm representing Ms. Maldonado issued a press release that referred to defendant Bennett's prior conviction. Judge Giovan found that the press release violated MRPC 3.6, suggesting that the lawyers knew trial was imminent when the press release was issued. But the information about defendant's prior conviction referred to in the press release was already well-publicized. Thus, it cannot be concluded that, when the press release was issued, a reasonable person would have expected that the content of the release would likely prejudice an adjudicative proceeding materially. Furthermore, contrary to the majority's assertion otherwise, because Bennett's prior conviction was well-publicized before plaintiff's lawyer's 2001 press release, the press release cannot be considered the source for all subsequent news publications that referred to the prior conviction.

Judge Giovan also suggested that the press release somehow violated Judge Macdonald's February 16, 2001, order, which excluded evidence of defendant's prior conviction from trial. However, while Judge Macdonald's order excluded the evidence of defendant's prior conviction from trial, it did not prohibit any and all public reference to the prior conviction by either plaintiff or plaintiff's lawyers.[2] For

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[2] After Judge Giovan took the case over from Judge Macdonald, defendant Ford and defendant Bennett filed a joint motion for entry of an order directing that the witnesses be instructed regarding excluded evidence and impermissible testimony on July 21, 2002. In their brief supporting their request, defendants stated that every witness in the *separate* trial of *Elezovic v. Ford Motor Co.* had to sign off on a statement indicating that they had been advised of the ruling by the Court regarding inadmissible evidence, and that they were not to mention anything about any excluded evidence, and that they understood the consequence for mentioning any of the excluded evidence would be sanctions including contempt and imposition of all the costs of a mistrial. Defendants request the same process in this case.

these reasons, it was not reasonable for Judge Giovan to premise his dismissal of plaintiff's case on the actions of her lawyers.

The majority admits that MRPC 3.6 does not apply to Ms. Maldonado because she is not a lawyer. *Ante* at 821. Further, like Judge Giovan, the majority fails to identify any specific instances in which Ms. Maldonado's lawyers violated MRPC 3.6. But, rather than acknowledging the circuit court's abuse of discretion in relying on MRPC 3.6 to dismiss Ms. Maldonado's case, the majority grasps for and creates its own alternative justifications for the circuit court's order.

The majority's primary justification for its decision to affirm the order of dismissal is the need for *order in the court.* In this case, the majority concludes that the dismissal of Ms. Maldonado's case was authorized under MCR 2.504(B)(1), which provides:

> If the plaintiff fails to comply with [the court] rules or a court order, a defendant may move for summary dismissal of an action or a claim against that defendant.

However, the mere fact that the court rule permits the circuit court to dismiss a case does not mean that dismissal is justified on a whim. By the plain terms of MCR 2.504(B)(1), there must be a violation of an applicable court rule or order to justify a summary dismissal of a case.

The defendants apparently hoped that Judge Giovan would issue an order in this case like that which Judge Macdonald had issued in the *Elezovic* case to prevent witnesses from mentioning defendant Bennett's prior conviction during their testimony on the witness stand. But Judge Giovan did not issue any such order.

In any event, the *Elezovic* order appears to have only limited the witnesses' speech inside the courtroom; it was directed at preventing impermissible testimony during the *Elezovic* trial regarding defendant Bennett's prior conviction that Judge Macdonald had ordered to be excluded from the evidence.

To make it seem like MCR 2.504(B)(1) justifies the dismissal of plaintiff's case, the majority intentionally misstates the facts to make it appear that plaintiff and plaintiff's lawyers violated a court order. The majority states: "Judge Giovan expressly warned plaintiff that if she continued to disseminate information regarding Bennett's excluded conviction in violation of Judge Macdonald's order he would dismiss her case. Plaintiff failed to obey this warning and, thus, Judge Giovan properly dismissed her case." *Ante* at 822. This is untrue. The facts are: (1) Judge Giovan's warning was not an order of the court,[3] (2) there *never* was a court order limiting pretrial publicity or references to defendant Bennett's prior conviction, (3) Judge Macdonald's order excluding evidence of defendant Bennett's conviction for indecent exposure from plaintiff's sexual harassment trial imposed no limitation on pretrial publicity, and (4) Judge Giovan did not premise his dismissal on plaintiff's violation of his warnings; instead, he incorrectly attributed plaintiff's activities to her lawyers to support his conclusion that they had violated MRPC 3.6.

The majority also relies heavily on the assertion throughout its opinion that plaintiff's lawyers were themselves quoted publicly referring to Bennett's prior conviction. Contrary to the majority's assertion, none of the broadcasts or articles cited by the majority quoted or discussed any statements by Ms. Maldonado's lawyers regarding Bennett's prior conviction for indecent exposure. In those broadcasts and articles, Ms. Maldonado's lawyers made statements about the case and about their perception that the circuit court was biased, but not about the expunged conviction. Immediately

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[3] Referring to the warning at the July 3, 2002, hearing on plaintiff's motion for his disqualification, Judge Giovan said: "I want to say a thing about gag orders. You've called what I said in court a gag order. Not so. As a matter of fact, I don't believe in gag orders. I've never issued a gag order."

after Judge Macdonald ruled that the conviction would be excluded, which was months before Judge Giovan was assigned the case, the lawyers were quoted as saying that they would appeal that order. Thereafter, all quoted statements about Bennett's prior conviction were made by Ms. Maldonado, and Ms. Maldonado was not restricted by any order or court rule from making repeated public reference to Bennett's prior conviction.

It was an abuse of discretion for Judge Giovan to attribute to plaintiff's lawyers responsibility for statements made by plaintiff and the press about the well-known fact that Bennett had a prior conviction for indecent exposure. It does not serve an organized polity for the majority to affirm a ruling that was based on a whim rather than the law.

III

A cornerstone for an organized polity is that courts of law will act in an orderly way, as opposed to acting on a whim. In an organized society, disputes are taken to a court of law for adjudication because a court is impartial and will handle cases with fairness and pursuant to the law. Dismissing Ms. Maldonado's case without a legal foundation is the same as dismissing the case on the basis of a whim. The majority's decision to affirm the circuit court's order damages the integrity of the judicial system and, contrary to the majority's rhetoric, undermines the basic tenets of an organized society.

MARILYN J. KELLY, *J.*, agrees.

APPENDIX B

[UNPUBLISHED]

COURT OF APPEALS OF MICHIGAN

No. 243763

JUSTINE MALDONADO,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY and DANIEL P. BENNETT,
Defendants-Appellees.

April 22, 2004

Before: BORRELLO, *P.J.*, and WHITE and SMOLENSKI, *JJ.*

PER CURIAM.

Plaintiff Justine Maldonado appeals as of right from the August 21, 2002 order of the Wayne Circuit Court granting defendants Ford Motor Company and Daniel Bennett's joint motion to dismiss her complaint on the ground that she and her attorneys engaged in prejudicial pretrial publicity. Plaintiff also appeals the trial judge's denial of her motion for recusal, which she filed on the basis that a member of defendant Ford Motor Company's law firm was the chair of the judge's re-election committee. Plaintiff also raises the issue whether the trial court abused its discretion in excluding evidence of Bennett's expunged conviction and the testimony of other female employees of Ford Motor Company. We affirm the decision of the trial court to exclude Bennett's conviction into evidence, and affirm the trial court on the issue of

recusal. We reverse the trial court's ruling on the admissibility of testimony of other Ford employees. While we also reverse the trial court's dismissal of plaintiff's case, we remand the matter back to the trial court to conduct an evidentiary hearing to determine if plaintiff and her counsel tainted the jury pool.

I. Factual Background

In June 2000, plaintiff filed a lawsuit against defendants, alleging sexual harassment under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* Specifically, plaintiff claims that defendant Bennett sexually harassed her in January and February 1998. Plaintiff testified in her deposition that on one evening, Bennett instructed her to take a production vehicle and drive it to a repair building some distance away. After dropping off the car, plaintiff got into Bennett's car. According to plaintiff, Bennett exposed his penis to her, demanding that she "suck it," and attempted to fondle her breasts and crotch. Plaintiff refused and got out of the car. Plaintiff further testified that a few days later, Bennett exposed himself again to her, using force to hold her hand to his exposed penis. Plaintiff again said no, pulled away from his grasp, and left the area. At the time, plaintiff did not tell anyone at the plant about these incidents. Shortly thereafter, plaintiff was transferred out of Bennett's department and was laid off. In June 1998, plaintiff was called back to work in a different section of the plant. Plaintiff testified that when she left work one evening, she saw Bennett following her as she left I-275 on her way home from work. Plaintiff contends that Bennett got out of his car, walked up to plaintiff's car, reached in to tug at the chest area of her blouse, and asked her to have sex with him in the nearby bushes. When plaintiff refused, Bennett returned to his car. As plaintiff drove away, she looked back to see Bennett sitting in his car, masturbating. According to plaintiff, from June 1998 through August 1999, Bennett continued to harass her at the plant, grabbing his

crotch, and making obscene gestures with his tongue. Plaintiff contends that several other employees were similarly harassed by Bennett.

Plaintiff also contends that she became aware of an incident where Bennett exposed himself to young girls. According to plaintiff, Bennett began following three high-school girls in a van driving next to their van and exposed himself as both vehicles drove down the expressway. Following a bench trial in district court in November 1995, Bennett was convicted of indecent exposure. After his conviction, Bennett continued to work as a superintendent at Ford's Wixom plant. His arrest and conviction were later expunged. Plaintiff sought to have Bennett's conviction introduced into evidence at trial thereby prompting Judge MacDonald to enter an order granting defendants' joint motion in limine to exclude evidence of Bennett's conviction for indecent exposure.

Shortly after the court entered the order excluding the conviction, plaintiff's attorneys circulated a press release announcing that they intended to file a motion to disqualify Judge MacDonald. They also provided details of Bennett's conviction for indecent exposure, which were subsequently disseminated in a series of news broadcasts and print stories. Plaintiff subsequently moved to disqualify Judge MacDonald, who stayed further proceedings, including trial. Judge MacDonald denied plaintiff's disqualification motion. Plaintiff then appealed Judge MacDonald's decision to the Chief Judge of the Wayne Circuit Court, who denied the appeal. Plaintiff thereafter sought leave of the trial court's decision to exclude the evidence, which had been denied by this Court and our Supreme Court. In February 2002, when Judge MacDonald was assigned to the Family Division of the Wayne Circuit Court, the case was reassigned to Judge Giovan.

Thereafter, defendants filed another joint motion in limine, seeking to exclude testimony about Bennett's treatment of women other than plaintiff. Following the hearing, the trial

judge met with the parties' attorneys in chambers to discuss the public comments of plaintiff's attorney.

Subsequently, plaintiff and plaintiff's counsel were interviewed by television and newspaper reporters regarding Bennett's conviction. On May 28, 2002, plaintiff was asked to speak about her case at a town hall meeting. According to defendants, plaintiff and her counsel mentioned Bennett's conviction at the town hall meeting. An article about sexual harassment at Ford's Wixom plant also appeared as the cover story of the *Metro Times* on June 12, 2002, in which plaintiff's counsel provided information about Bennett's conviction.

Following Judge Giovan's assignment of the case, plaintiff brought a motion to dissolve the order excluding evidence of Bennett's conviction. Following the hearing, the trial court denied plaintiff's motion to dissolve Judge MacDonald's order excluding evidence of Bennett's prior conviction and granted defendants' motion in limine to exclude testimony of other women about Bennett's sexual harassment. During the hearing on June 21, 2002, Bennett's counsel raised concerns about plaintiff and her counsel providing information of the excluded evidence of Bennett's conviction to the *Metro Times*, especially since the case was approaching trial. In response to such allegations, the trial Court stated:

> THE COURT: I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.

Shortly thereafter, plaintiff gave deposition testimony in which she indicated that she intended to continue publicizing information about Bennett's expunged conviction. A few

days later, on June 26, 2002, plaintiff and her counsel appeared with the "Justice for Justine Committee" at a press conference held in front of Ford's world headquarters in Dearborn. Leaflets containing information about Bennett's conviction were handed out during the press conference.

On July 1, 2003, plaintiff filed an emergency motion to disqualify Judge Giovan. After a hearing on July 3, 2002, Judge Giovan denied the motion. The basis of plaintiff's disqualification motion was that a chairman of Judge Giovan's re-election campaign, Kelvin Scott, was a lawyer with the firm defending Ford in the present case.

At the close of arguments, Judge Giovan denied the disqualification motion. Afterward, one of plaintiff's counsel, Miranda Massie, while being interviewed by Channel 4, WDIV, said on television:

> Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased rulings in these cases.

Defendants then brought a joint motion for dismissal, predicated on plaintiff and her counsel engaging in improper pre-trial statements. Thereafter, the trial court issued an opinion and order granting defendants' joint motion to dismiss. The trial court based that its dismissal on its "inherent power to impose sanctions on the basis of the misconduct of a party or an attorney." The trial court held that in "[t]he case at bar . . . . (1) the pretrial publicity here has been instigated by the plaintiff and her counsel, and (2) the publicity *does* contain repeated references to evidence ruled inadmissible at trial" (emphasis in original). Thus, Judge Giovan concluded that he had the authority to dismiss plaintiff's case for misconduct on the basis that "[plaintiff] and her attorneys [had] premeditat-

edly threaten[ed] the integrity of the judicial process." In addition to citing the inherent power of the court, Judge Giovan, citing MCR 2.504 and MCR 2.313, also concluded that "there is sufficient authority in the court rules themselves for the grant of a dismissal or a default in appropriate cases."

II. Dismissal of the Matter

Plaintiff contends that the trial court's dismissal of her case violated her right to free speech and freedom from discrimination. Plaintiff states there was no legal or factual support for the trial court's sanction against plaintiff's attorneys, absent a hearing to conclude whether the jury pool had been tainted by plaintiff's pre-trial publicity. Another argument of plaintiff is that she and her attorneys have a protected First Amendment right to speak out against sexual harassment at the Ford Wixom plant by publicizing the fact of Bennett's conviction. Conversely, defendants assert that plaintiff and her attorneys repeatedly refused to abide by the rulings of the trial court, despite the fact that they were warned by the trial court that any further attempt to taint the jury pool would result in dismissal. In particular, defendants point to the fact that plaintiff admitted she publicized Bennett's expunged conviction at her deposition, during a television interview, and at a demonstration at the Ford Wixom plant.

In *Persichini v. Beaumont Hospital*, 238 Mich.App 626, 639; 607 NW2d 100 (1999), this Court noted that it has "repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney." At issue in *Persichini*, *supra*, was the trial court's ability to impose sanctions for defendant's attorney fees, lost income and travel expenses of witnesses. Our Court stated that the question whether the trial court has the authority to impose such awards as a sanction is a question of law, subject to review de novo, whereas an exercise of the court's inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. *Id.* at 637, 642. In *Cummings*

v. Wayne County, 210 Mich.App 249; 533 NW2d 13 (1995), witnesses experienced incidents of vandalism and received numerous telephone calls and threats that they would be killed if they testified. Acting upon these reports from witnesses, the trial court held an evidentiary hearing, during which extensive testimony was elicited and affidavits received from the witnesses regarding the threats and vandalism. These incidents were attributed to plaintiff. Defendant subsequently moved for dismissal with prejudice on the basis of witness tampering. The trial court granted the motion. In affirming the decision of the trial court, our Court held:

The authority to dismiss a lawsuit for litigant misconduct is a creature of the "clean hands doctrine" and, despite its origins, is applicable to both equitable and legal damages claims. *Buchanan Home & Auto Supply Co v Firestone Tire & Rubber Co*, 544 F.Supp. 242, 244-245 (D SC, 1981). The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process. *Id.* See also *Mas v. Coca-Cola Co*, 163 F.2d 505, 507 (CA 4, 1947). While this Court has recognized that substantive distinctions between law and equity survived the procedural merger of law and equity, see Clarke v Brunswick Corp, 48 Mich.App 667, 669; 211 NW2d 101 (1973), we do not believe that the distinction prevents a court of law from invoking the "clean hands doctrine" when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties. The "clean hands doctrine" applies not only for the protection of the parties but also for the protection of the court. *Buchanan Home*, *supra* at 244. "Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co v. Hartford-Empire Co*, 322 U.S. 238, 246; 64 S Ct 997; 88 L Ed 1250 (1944). See also *Precision Instrument*

Mfg Co v Automotive Maintenance Machinery Co, 324 U.S. 806, 814-815; 65 S Ct 993; 89 L Ed 1381 (1945). *Id.* at 252.

In this case, the first issue is whether the trial court possessed the legal authority to dismiss plaintiff's complaint with prejudice on the basis that plaintiff and her attorneys intentionally and repeatedly disclosed excluded evidence through the public media for the purpose of tainting the jury pool so as to deny defendants a fair trial. In dismissing plaintiff's complaint, the trial court relied upon its inherent powers under the court rules, which it found in MCR 2.504 and MCR 2.313. MCR 2.504(B)(1) states that a defendant may move for dismissal of an action or a claim against the plaintiff if the plaintiff fails to comply with "these rules or a court order." While the trial court never issued a written order precluding plaintiff or her counsel from engaging in pre-trial publicity, it did warn the parties on the record, stating, "If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment." Consequently, the trial court opined that plaintiff and her counsel, despite warning from the court, had attempted to taint the jury pool by continuing to disseminate excluded evidence.[1]

Our trial courts possess the legal authority to sanction litigants and their counsel, including the right to dismiss an action. This legal authority is not governed so much by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Chambers v. NASCO, Inc*, 501 U.S. 32, 43; 111 S Ct 2123; 115 L.Ed.2d 27 (1991). Having found that the trial court possessed the legal authority to dismiss this action, we next turn our analysis to whether the

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[1] We find that the trial court's reliance on MCR 2.313 was misplaced because the rule pertains to discovery sanctions.

trial court's dismissal of the case constituted an abuse of discretion.

On appeal, plaintiff maintains that the trial court had no legal or factual basis to sanction plaintiff or her attorneys for their conduct in this case. Plaintiff and her counsel contend that she and her attorneys have a protected First Amendment right to speak out against sexual harassment at the Ford Wixom plant by publicizing the fact of Bennett's conviction.

In *Davis v. Dow Corning Corp*, 209 Mich.App 287, 294; 530 NW2d 178 (1995), this Court, citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072-1073; 111 St Ct 2720; 115 L Ed2d 888 (1991) and *Seattle Times Co v. Rhinehart*, 467 U.S. 20, 32; 104 S Ct 2199; 81 L.Ed.2d 17 (1984), stated that "it is not a violation of the First Amendment to impose certain restrictions on attorney speech in the context of litigation and in order to remedy ethical violations." This Court further noted in *Davis*, *supra* at 295-296, that, in *Gentile*, the United States Supreme Court "recognized that membership in the bar is a privilege that comes with conditions" and that "obedience to ethical precepts may require abstention from what, in other circumstances, would be constitutionally protected speech." Additionally, our Court stated that "an attorney may not, by speech or by other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Id.* at 204, quoting *Gentile*, *supra* at 1071.[2]

However, as the Supreme Court noted in *Gentile*, *supra* at 1075, limitations on attorney speech must be "narrow and necessary." In *Gentile*, the Supreme Court addressed the standard governing the state's ability to discipline an attorney, under an ethical rule that is identical in all relevant respects to MRPC 3.6, regarding speech about parties or proceedings in which the attorney was involved. In *Gentile*, the United States

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[2] We note that while such constraints may be placed on legal counsel (See MRPC 3.6), they do not apply to plaintiff.

Supreme Court, rejecting the attorney's claim that he should be subject to a "clear and present danger" standard applicable to the press, concluded that the "substantial likelihood of material prejudice" standard was constitutional as applied to the attorney:

> The "substantial likelihood" test . . . is constitutional . . . for it is designed to protect the integrity and fairness of a state's judicial system and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. [*Id.*]

Unlike the trial court in *Cummings*, *supra*, in this case the trial court did not conduct an extensive evidentiary hearing to specifically determine whether the conduct of plaintiff and her attorneys caused any prejudice to the defendants' right to a fair trial. Therefore, it cannot be determined by the record before us whether the public dissemination of Bennett's conviction by plaintiff and her attorneys prevented defendants from receiving a fair trial on the ground that the jury pool was tainted. In the absence of an extensive evidentiary hearing, it is not clear whether the trial court dismissed plaintiff's complaint on the basis of an assumption that the pretrial publicity jeopardized the defendants' right to a fair trial. Also, unlike *Cummings*, where dismissal with prejudice on the basis of witness tampering was the only reasonable remedy in view of the numerous incidents of vandalism and death threats, it appears that dismissal here was the only sanction considered by the trial court. Although we hold that a trial court has the inherent authority to dismiss a case for egregious misconduct, the question presented here is whether dismissal was the proper sanction where other less drastic remedies were available to ensure that defendants received a fair trial. Because it appears that the trial court based its decision in large measure

on presumption, we conclude that the trial court abused its discretion by dismissing plaintiff's complaint without conducting a full evidentiary hearing.[3]

We therefore rev[illegible] the trial court's dismissal and remand the matter to the trial court for a full evidentiary hearing to determine whether under the "substantial likelihood" test in *Gentile*, *supra*, the conduct of plaintiff and her attorneys generated pretrial publicity that contaminated the jury pool so as to deprive defendants of a fair trial.

III. Exclusion of Evidence

Plaintiff next contends that the trial court abused its discretion by excluding evidence of Bennett's conviction. We disagree. We adopt the ruling of this Court in *Elezovic v. Ford Motor Company*, 259 Mich.App 187; 673 NW2d 776 (2003), *special panel denied*, 259 Mich.App 801 (2003), which held on this same evidentiary issue:

> The trial court did not abuse its discretion in excluding, under MRE 404(b) evidence of Bennett's 1995 conviction of indecent exposure and the facts associated with that conviction. . . . To be admissible under MRE 404(b), evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be rele-

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[3] Because we find that the trial court abused its discretion by dismissal of this action prior to a full evidentiary hearing, we need not fully decide the issues of First Amendment rights raised by plaintiff and amicus curie ACLU except to state that the trial court never issued an explicit order-written or oral stating what speech was limited. Therefore, the trial court dismissed this matter under an unconstitutionally vague standard that conflicts with the due process requirements set forth in *Gentile*, *supra.* Having found that the trial court never issued a direct order pertaining to which speech was prohibited we need not decide the issues of constitutionality of such orders raised by amicus curie ACLU. We do however recommend that on remand of this matter, the trial court issue a constitutionally valid order restraining the parties and their counsel from engaging in impermissible pretrial publicity.

vant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice, MRE 403. *People v. Starr*, 457 Mich. 490, 496, 498; 577 NW2d 673 (1998); *People v. VanderVliet*, 444 Mich. 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich. 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.* at 74. The trial court did not abuse its discretion in excluding evidence of Bennett's conviction. Plaintiff failed to establish that the evidence was offered for a proper purpose. Bennett's act of indecent exposure outside the workplace is not sufficiently similar to sexually harassing an employee in the workplace to establish a common plan, scheme, or system. *People v. Sabin (After Remand)*, 463 Mich. 43, 63-66; 614 NW2d 888 (2000). Unlike in *Sabin*, *Id.* at 64-65, here, there was not a sufficiently strong showing that evidence of Bennett's conviction shared a "concurrence of common features" with his alleged sexual harassment of plaintiff. Further, even if the evidence was admitted for a proper purpose, we would find no abuse of discretion in the court's exclusion of the evidence otherwise under MRE 404(b). . . . We also reject plaintiff's claim that Bennett's conviction was admissible against Ford because it was essential evidence of notice to Ford of Bennett's conduct, which was necessary to proving respondeat superior. *Chambers*, *supra* at 312. As plaintiff correctly notes, the Michigan Supreme Court has taken a "sliding scale" approach to the MRE 403 analysis. See *People v. Mills*, 450 Mich. 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich. 1212 (1995). "The idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury." *Mills*, *supra* at 75, quoting *Sclafani v. Peter S Cusimano, Inc*, 130 Mich.App 728, 735-736; 344 NW2d 347 (1983). Plaintiff contends that Bennett's

conviction was highly probative evidence and should have been admitted because it was "absolutely essential background fact" in considering the totality of the circumstances with regard to notice. *Sheridan*, *supra* at 622. Plaintiff maintains that knowledge of the indecent exposure conviction would lead a reasonable employer to conclude that plaintiff's general complaints about Bennett were indicative of sexual harassment. Plaintiff asserts that such essential evidence can never be excluded under MRE 403. We find plaintiff's argument unconvincing. Plaintiff had previously made a specific complaint of sexual harassment against her union committeeman at Ford and, on the contrary, voiced only nonsexual complaints against Bennett. Under these circumstances, we cannot agree with plaintiff's contention that the evidence was essentially conclusively probative of notice. Plaintiff has otherwise failed to show any link between Ford's knowledge of Bennett's indecent exposure conviction and Ford's receipt or investigation of plaintiff's work complaints. The court did not abuse its discretion in excluding the conviction evidence on the basis that its probative value was substantially outweighed by the danger of unfair prejudice. At most, the evidentiary issue presented a close question. There can ordinarily be no abuse of discretion in a trial court's decision regarding a close evidentiary question. *Sabin*, *supra* at 67. *Elezovic*, *supra* at 206-208.

We therefore conclude that the trial court did not abuse its discretion in denying plaintiff the right to introduce Bennett's conviction for indecent exposure.

Plaintiff next argues that the trial court abused its discretion by excluding testimony of other female Ford employees and Milissa McClements. We agree.

Unlike the evidentiary issue presented relative to Bennett's conviction, the testimony of these other female employees

and McClements does not present a close question regarding its admissibility. The testimony of other Ford employees as well as that of McClements is admissible to allow plaintiff to prove the existence of a hostile work environment. In *Radtke v. Everett*, 442 Mich. 368, 395 n 41; 501 NW2d 155 (1993), the Court held that an employer may be liable for a sexually hostile work environment created by its agent only if "the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action." In *Radtke*, *supra*, 442 Mich. at 398, the Michigan Supreme Court noted:

> A hostile work environment claim is actionable only when, in the totality of the circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant's conduct or communication had either the purpose or effect of substantially interfering with the plaintiff's employment, or subjecting the plaintiff to an intimidating, hostile, or offensive work environment. [*Id.* see also *Chambers v. Trettco, Inc*, 463 Mich. 297, 316; 614 NW2d 910 (2000) (holding that an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment")].

In this case, plaintiff sought to introduce the testimony of other female Ford employees and Milissa McClements to establish that she was subjected to a hostile work environment at the Ford Wixom plant. Evidence that women other than plaintiff were subjected to a hostile work environment at the Ford Wixom plant is highly relevant under MRE 401 to show plaintiff's hostile environment claim. Moreover, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to defendants or confusion of the issues. Specifically, evidence of the other

acts of harassment is highly probative about whether defendant Ford should have known that Bennett was sexually harassing plaintiff. See generally, *Jackson v. Quanex*, 191 F3d 647 (CA 6, 1999); *Hicks v. Gates Rubber Co*, 833 F.2d 1406 (CA 10, 1987).

We reject defendant Ford's contention that plaintiff sought to use the testimony of these other women for the purpose of proving that Bennett acted consistent with his character in sexually harassing plaintiff. Rather, we find that plaintiff sought to introduce the testimony of these other women to demonstrate Ford's liability under the doctrine of respondeat superior. In this regard, such testimony was clearly relevant to plaintiff's sexual harassment claim because plaintiff must show that Ford had notice of Bennett's sexual harassment under the "totality of the circumstances" known to Ford. See *Jackson*, *supra*, 191 F3d at 647. Even though we are not persuaded with defendant Ford's argument that the evidence is being submitted for the improper purpose of demonstrating Bennett's character under MRE 404(a), in the event plaintiff does make use of the evidence in such an improper manner, Ford can request that the trial court provide a limiting instruction regarding the testimony of these other women. We therefore reverse the decision of the trial court and hold that the testimony of the enumerated Ford employees and McClements is admissible for the reasons set forth in this opinion.

IV. Defendant Bennett

All parties agree that pursuant to this Court's ruling in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich.App 464; 652 NW2d 503 (2002), defendant Bennett should be dismissed with prejudice from further proceedings in this matter. We thus direct the trial court to enter an order dismissing defendant Bennett with prejudice from this case.

V. Recusal

Plaintiff next contends that Judge Giovan should be recused because he had an "ongoing matter or relationship" with Kelvin Scott, an attorney with the firm representing defendant Ford. According to plaintiff, Judge Giovan never informed plaintiff's counsel that Scott was then the chair of his re-election campaign fundraiser that was taking place in the summer of 2002, when this case was set for trial before Judge Giovan. Plaintiff maintains that Judge Giovan's relationship with Scott created at least "the appearance of impropriety" because he has the affirmative duty, pursuant to the Michigan State Bar Ethics Committee, Opinion JI-079 (February 7, 1994) to disclose such a relationship to opposing counsel and all parties. Because we cannot find that an unethical relationship existed between Scott and Judge Giovan, no ethical violations were committed.

"When this Court reviews a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion; however, the applicability of the facts to relevant law is reviewed de novo." *Armstrong v. Ypsilanti Twp*, 248 Mich.App 573, 596; 40 NW2d 321 (2001).

MCR 2.003(B) states, in relevant part:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
>
> (1) The judge is personally biased or prejudiced for or against a party or attorney.

The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

Our Supreme Court has held that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." [*Cain v. Dep't of Corrections*, 451 Mich. 470; 548 NW2d 210 (1996), quoting *Liteky v. United States*, 510 U.S. 540; 114 S Ct 1147, 1155, 127 L.Ed.2d 474 (1994).]

We note that plaintiff waited to bring her motion for disqualification until Judge Giovan made his ruling on whether Bennett's conviction could be admitted into evidence. Similarly, plaintiff attempted to disqualify Judge MacDonald shortly after she made the same ruling. Such methodology lends credence to Judge Giovan's assertion that plaintiff merely awaits the trial court's ruling then brings a motion for disqualification. Additionally, plaintiff has failed to demonstrate that she brought her motion for disqualification within fourteen days of discovery of the alleged association between Scott and Judge Giovan. See MCR 2.003(C)(1).

Other than to point to rulings not of her liking, plaintiff has failed to point out to this Court any concrete factor of bias or prejudice on the part of the trial judge. The actions of plaintiff and her counsel demonstrate that while they were extremely upset, if not outraged by the rulings of the trial court, the record indicates that Judge Giovan treated this case and the litigants with respect and a great degree of tolerance. Because nothing in the record indicates that Judge Giovan acted with

prejudice or impropriety, we are not persuaded that the trial court or the Deputy Chief Trial Judge abused their discretion by not disqualifying Judge Giovan from this matter. Accordingly, we remand this case back to Judge Giovan for rulings consistent with this opinion.

Affirmed in part, reversed in part and reversed and remanded in part. We do not retain jurisdiction.

WHITE, *J.* (concurring in part and dissenting in part).

WHITE, *J.*

I agree that a circuit court has authority to impose sanctions for misconduct of a party or an attorney. Under the circumstances that no order was violated, no hearing was held regarding the motivations of plaintiff or plaintiff's counsel,[1] and no hearing was held to determine whether the jury pool was in fact tainted, I agree that the circuit court abused its discretion in dismissing the case.[2]

Because the public statements at issue occurred nearly two years ago, and the requisite record was not made when the case was dismissed, I would not direct that a hearing now be held on remand.

Regarding Bennett's conviction, I agree that it was not an abuse of discretion to exclude it on the basis that it was more prejudicial than probative, MRE 403. However, I do not come to this conclusion in reliance on *Elezovic v. Ford Motor Co*, 259 Mich.App 187; 673 NW2d 776 (2003). While *Elezovic* involved the same alleged harasser and the same conviction, it was a different case with different facts. The conviction is not per se inadmissible, and its admissibility in each case involving Bennett should be assessed based on the facts and

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[1] While the court did not make an express finding to this effect, it appears that the court found that the statements were intended to taint the jury pool. Plaintiff's and counsel's willfulness in publicizing the information is not tantamount to an intent to taint the jury. Plaintiff and her counsel apparently believed that plaintiff's experiences with Bennett, her case, and Bennett's asserted history were matters that should concern the public, and were worthy of publicity. While plaintiff and her counsel were clearly indifferent to the possibility of tainting the jury pool, it does not follow that this was their intent.

[2] I note that the court did not dismiss the case on the basis of counsel's statements to the press regarding the alleged bias of the Wayne County bench.

issues in that case. While the decision whether to admit the conviction is a matter of discretion on this record, rather than affirm the circuit court's exclusion of Bennett's conviction, I would direct that the matter be reassessed on remand, under the circumstance that both the probative value and the prejudicial impact must be reassessed in light of the additional evidence that will be admitted as a result of this Court's decision-testimony of other female Ford employees that the circuit court had previously excluded.

I agree that the court erred in excluding the testimony of the other female Ford employees and McClements. Plaintiff sought to introduce this testimony for several purposes: to establish that a hostile work environment existed at the Ford Wixom plant, to establish that plaintiff herself was subjected to a hostile work environment, and to establish respondeat superior, i.e., that Ford had or should have had notice of Bennett's sexual harassment, and that Ford failed to take prompt and adequate remedial action. Ford asserted lack of notice.[3]

In order to demonstrate a claim of hostile environment sexual harassment, an employee must prove that 1) the employee belonged to a protected group; 2) the employee was subjected to communication or conduct on the basis of sex; 3) the employee was subjected to unwelcome sexual conduct or communication; 4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and 5) respondeat superior. *Radtke v. Everett*, 442 Mich. 368, 382-383; 501 NW2d 155 (1993).

The testimony of the other women is admissible to show the existence of a hostile work environment at the Ford Wixom Plant, and was relevant to establish that plaintiff herself was

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[3] While it is unclear from Ford's appellate brief, it may contest further whether the alleged incidents actually happened.

subjected to a hostile environment by virtue of Bennett's conduct, as plaintiff testified and presented evidence that Bennett harassed her, and that she was aware of Bennett's harassment of several of the other women.

In addition, evidence of Bennett's alleged other acts of harassment was relevant toward establishing respondeat superior liability; his harassment of other women at the plant is probative of whether and to what extent defendant Ford had notice of Bennett's conduct and whether defendant failed to take prompt and adequate remedial action in the face of such notice. See *Chambers v. Trettco, Inc*, 463 Mich. 297, 316; 614 NW2d 910 (2000) (holding that an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment.") Further, as the majority notes, the testimony of other female employees is probative of the totality of the circumstances surrounding Maldonado's claims, see *Chambers*, *supra* at 319 ("notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring"), as it is to establish what exactly Ford knew about Bennett's propensities and conduct at the time that Maldonado complained of his harassment, and whether Ford took prompt and adequate remedial action.

I acknowledge that all of the testimony of the other workers may not be admissible as to each issue. On remand, the court should be free to sort this out and exclude specific testimony and give limiting instructions as necessary.

I join in parts IV and V of the majority opinion.

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

No. 00 018619 NO

Hon. William J. Giovan

JUSTINE MALDONADO,

Plaintiff,

v.

FORD MOTOR COMPANY and DANIEL P. BENNETT,
Jointly and Severally,

Defendants.

OPINION ON MOTION TO DISMISS

The defendants jointly bring a motion to dismiss plaintiff's action on the grounds that she and her attorneys (1) have engaged in prejudicial pretrial publicity, and (2) have engaged in undignified and discourteous conduct toward the court. The motion is granted on the first of those grounds.

A. Prejudicial Pretrial Publicity.

Justine Maldonado filed this action for sex harassment under the Elliott-Larson Civil Rights Act against the Ford Motor Company and one of her supervisors at the Ford Wixom Plant, defendant Daniel P. Bennett. She contends that at various times in 1998, Mr. Bennett exposed his private parts to her, placed her hand on them, demanded oral sex from her, grabbed his crotch, wagged his tongue, and followed her home. She first related allegations of that kind to a Ford Motor Company management employee, her uncle, in Octo-

ber, 1998, some months after the alleged misconduct. At that time and later, other female employees of the Wixom plant made similar allegations regarding Mr. Bennett. Two of them also filed civil actions against the defendants, both represented by the same attorneys as the plaintiff.

Both defendants deny the acts charged against Mr. Bennett. They contend that the plaintiff and the other complainants invented their accusations only after learning that Mr. Bennett had been convicted on a misdemeanor charge of indecent exposure after he allegedly exposed himself to three young girls while driving on a freeway in August of 1995.

Mr. Bennett's conviction was expunged on November 9, 2001 in an order entered by the Honorable John MacDonald of the 35th District Court pursuant to MCL 780 621 *et seq.* By provision of that statute, the knowing disclosure of a conviction that has been set aside is a misdemeanor.[1]

This action and a similar one filed by Lula Elezovic were earlier assigned to the Honorable Kathleen Macdonald. On February 16, 2001, Judge Macdonald granted a joint motion by these defendants in both actions to exclude from the trials any evidence regarding the freeway incident or the subsequent conviction.[2] Ms. Elezovic's trial ended with Judge Macdonald's grant of a directed verdict in favor of the defendants.

When Judge Macdonald was later assigned to sit in another division of the court, this action was reassigned by lot. The

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[1] MCL 780.623(5) provides:

> Except as provided in subsection (2), a person, other than the applicant who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.

[2] That ruling was grounded on MRE 404(a), which forbids evidence of character offered to prove action in conformity with it on a given occasion.

plaintiff filed a motion requesting this court to reconsider Judge Macdonald's earlier order disallowing evidence of Mr. Bennett's conviction and his behavior on the freeway in 1995. On June 21, 2002, the court declined to modify Judge Macdonald's order on the basis that the forbidden use of the evidence would grossly outweigh whatever negligible value the evidence might have, if there were any value at all, on the question of notice to the Ford Motor Company regarding workplace harassment by Mr. Bennett. On the same occasion, the court granted defendants' motion to exclude the testimony of female co-workers of the plaintiff on the basis that their protestations occurred after the alleged incidents between plaintiff and Mr. Bennett, thus not being admissible on the issue of notice, and on the additional basis that such testimony would also be barred by MRE 404(a).

The defendants bring this motion on the principal ground that both the plaintiff herself and her attorneys have intentionally and repeatedly disseminated the proscribed evidence through the public media when they knew or should have known that the information would have a substantial likelihood of tainting the trial of this action.

We can start with the plaintiff herself. She has publicly disclosed the fact of his conviction many times. We know that because she has told us so. At a deposition given on June 24, 2002, she testified:

> Q: [by Mr. Morgan, defense counsel] If you can give me a ballpark figure, how many times since you found out about the expungement have you told other people about the fact that Mr. Bennett had this conviction that was later expunged?
>
> [Ms. Massie, plaintiff's counsel] You mean at people, period, one person at a time?

Q: Any individual, whether it's groups, how many times has she gone out and publicized it, divulged it.

A: I have no idea. It's been a lot.

Q: Over 100?

A: I don't know.

Q: Over ten?

A: Oh, definitely over ten, possibly over 100.

Not only has plaintiff made these public disclosures while aware of Judge Macdonald's exclusionary order, she has done so though aware of the illegality of such disclosures. We know that because she has told us so:

Q: You knew about that provision of the statute, didn't you?

A: From what I was understanding, and it was from only the expungement record down at the bottom it said that the court couldn't.

Q: Okay. Have you seen the expungement statute?

A: The—are you talking on the law books, have I looked in that sort of thing, or are you talking about what I saw on the bottom of that expungement?

Q: Has someone showed you that there was—there is a law in Michigan that states that there's a prohibition on any person divulging, using or publicizing the fact or facts related to a conviction that has been set aside under that statute?

A: No one showed me a statute such as that.

Q: You are aware, though, that on behalf of Mr. Bennett I have informed your counsel that the statute, the expungement statute specifically prohibits your using, publicizing, divulging the fact that Mr. Bennett had a conviction since it's been expunged?

A: I'm aware that your whining and crying because I'm talking about it all over town, yes, I'm aware of that. . . . (Deposition of June 24, 2002.)

Notwithstanding the rulings of two judges, and notwithstanding the apparent illegality of disclosing the conviction, nothing will deter the plaintiff from continuing to publicly broadcast that information. We know that because the plaintiff has told us so:

> A: . . . I won't shut up about it. It's the truth. You can expunge it but it's the truth, and I'm going to tell it, and you know what? I will tell anybody that will listen because this man is a menace and he must be stopped, and you know it and you know it. But you guys want to protect him, that's fine, I'm not. I don't have to protect Mr. Bennett.
> Q: So you've been talking about it—
> A: To anyone.
> Q: —any chance you get, to anyone—
> A: That's right.
> Q: —even though—even since you became aware that it was expunged?
> A: Yes. Absolutely.
>
> * * *
>
> If I could get it out on the internet, I would put it out on the internet.
>
> (Deposition of June 24, 2002.)

Two days after her deposition the plaintiff participated with the Justice for Justine Committee in a demonstration at Ford headquarters under the view of invited television news cameras. The participants distributed leaflets to the public (Attachment A), which recited Mr. Bennett's conviction and his alleged behavior toward other women that the court had ruled inadmissible. A similar demonstration was held the following day at the Ford Wixom plant, distributing a similar leaflet. (Attachment B.)

The plaintiff's broadcast of the proscribed material is done with disregard of the court's authority and with disregard for the consequences. We know that because the plaintiff has told us so. In a television interview broadcast locally on WDIV Channel 4 on June 26, 2002, she said, referring to the court,

> "If we don't act the way he wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment."

The plaintiff defends her behavior on the basis that the prohibition of Michigan Rule of Professional. Conduct 3.6 applies only to attorneys, not parties. The rule says:

> Rule 16 Trial Publicity
>
> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.[3]

It is true that the Rules of Professional Conduct are directed to lawyers. But in attempting to exonerate her personal behavior on that basis the plaintiff makes, in effect, this argument: "Yes, I may have done things that violate the purpose of the rule, and I will continue to do so no matter what any court says. But the prohibition applies to my agents, and I am only the principal. Therefore I am free to engage in this conduct with impunity."

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[3] The comment to Rule 3.6 enumerates various kinds of statements identified in the American Bar Association's parallel rule as being likely to have a prejudicial effect: The first listed is a statement which relates to "the character, credibility, reputation or criminal record of a party . . . or the expected testimony of a party or witness."

The plaintiff is the owner and potential beneficiary of any cause of action that she may have, not her attorneys. She is not immune for knowingly doing what they cannot.

In any event, her counsel have enough to answer for themselves. On September 11, 2001, while Judge Kathleen Macdonald's order of exclusion was still in effect, and after she had granted a directed verdict in the Elezovic case, plaintiffs law firm issued a press release on firm letterhead (Attachment C) which made several explicit references to Mr. Bennett's criminal conviction, the underlying conduct involved, and to the fact that Judge Macdonald had excluded these from evidence.

A *press release*. There is nothing more premeditated than a press release.

That counsel would highlight excluded evidence in a press release seems offense enough. But here they did so while believing that the trial was imminent. The third paragraph of the press release says, "A pending case against Bennett and Ford will be going to trial soon."

There is more. Plaintiff's counsel freely admit that they have invited the media to court dates and other events on multiple occasions. While there is no misconduct involved in merely advising the press about court dates, a number of instances of the publicity generated by the plaintiff have made specific references to the prohibited evidence from information supplied by the plaintiff. More than one of the television broadcasts showed film of a court document relating to the criminal conviction. Indeed, George Washington, plaintiff's lead counsel, and Miranda Massie, another of plaintiffs attorneys, themselves appeared in television news broadcasts that made specific references to Mr. Bennett's criminal conviction.

Jodi-Marie Masley, another member of plaintiff's law firm, participated in the demonstration at Ford Headquarters on June 26, 2002, on which occasion the leaflets represented by

Attachment A were handed out. At oral argument she said that neither she nor any member of the law firm wrote the circular that detailed the prohibited evidence. As she correctly contends, Ms. Masley has the right to participate in demonstrations, and she is not responsible for the independent behavior of others. But she does not have the right to ". . .(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;" MRPC 8.4(a). But the Justice for Justine Committee, the ostensible authors of the material, seem to be intimately connected with the plaintiff, having appeared with her and her attorneys at multiple court sessions. At a minimum, neither the plaintiff or any of her counsel have ever suggested that they have attempted to dissuade them from distributing circulars that highlight evidence ruled inadmissible by two judges.

Then there is the extensive article that appeared in the June 12-18, 2002 issue of the Metro Times, a newspaper widely distributed in Detroit, and in the courthouse itself. The entire front page highlights the article. Although the article contains quotes from both plaintiff's and defendants' counsel, the defendants claim that it was plaintiff's attorneys who provided the reporter with the extensive information in the article about Mr. Bennett's conviction and the underlying behavior. The circumstances support that charge, and the plaintiff does not deny it.

Plaintiff's counsel share the same disregard that the plaintiff herself has for the statute prohibiting disclosure of an expunged conviction. During an in-chambers discussion on May 17, 2002 in which defense counsel suggested that the court issue an order directing plaintiff's attorneys not to publicize the conviction[4], Mr. Washington stated that the statute

[4] The court declined to entertain a "gag order," on the basis that the Rules of Professional Conduct govern what counsel can say about pending litigation, and without the need for reinforcement by the court.

was unconstitutional for being contrary to the first amendment, and that he and his client had every right to continue to publicly disclose the fact of the conviction. Ms. Masley made the same contention at the hearing on the motion to dismiss.

We note, first of all, that counsel are more tolerant of the prohibition of the expungement statute when it suits plaintiff's purpose. At a deposition on July 11, 2001 of David Ferris, a witness for the plaintiff, Mr. Washington invoked the statute to prevent the defendant from questioning the witness about an expunged conviction of the witness.

In any event, the constitutionality of the expungement statute is not a controlling issue in this motion. The purpose of the prohibition against disclosure of an expunged conviction is that of advancing the rehabilitation of those who have qualified under the statute. The gravamen of defendants' motion, on the other hand, relates more to standards designed to prevent a trial from being infected by inadmissible evidence. Whether or not the statute is unconstitutional, the rules of evidence are not. Nor are the orders of two judges made in pursuance of those rules. At the very least, that the plaintiff and her counsel are both willing and determined to publicly disseminate the fact of Mr. Bennett's conviction in the face of a statute that no court has held to be unconstitutional underscores the willfulness of their conduct. Whether their conduct is also criminal needn't be determined in any formal way for purposes of this motion.[5]

---

[5] As for plaintiff's contention that the statute prohibits nothing other than the disclosure by court personnel of records relating to an expunged conviction, that argument is refuted by the plain words of the statute. MCL 780.623(5) by its literal terms applies the prohibition to anyone other than the convicted person. The only exception, described in subsection (2) of the statute, applies to department of state personnel, and then only in limited circumstances, none of which involve disclosure to the public.

In attempting to defend the behavior of counsel, plaintiff relies heavily on Justice Kennedy's opinion in *Gentile v State Bar of Nevada*, 501 US 1030, 115 L Ed 2d 888, 111 S Ct 2720 (1991), a case that nullified the discipline of a lawyer for violating Nevada's version of the ABA Model Rule of Professional Conduct 3.6. That opinion affords no refuge to the plaintiff. First, it was careful to point out that the decision did not affect the constitutionality of provisions that forbid speech by attorneys that will have a substantial likelihood of materially prejudicing an adjudicative proceeding. The opinion, furthermore, was careful to make the following points about the attorney's behavior in that case: (1) The statement that the attorney made at his press conference made no mention of any evidence ruled inadmissible at trial, and (2) the attorney's statement was a defensive measure, aimed at countering substantial publicity generated by the police for the purpose of masking the guilt of the real culprit and of creating the impression that the attorney's client was guilty. The case at bar, of course, is starkly different because, (1) the pretrial publicity here has been instigated by the plaintiff and her counsel, and (2) the publicity *does* contain repeated references to evidence ruled inadmissible at trial.

The plaintiff questions the authority of the court to dismiss her case on the grounds asserted. However, in *Persichini v Beaumont Hospital*, 238 Mich App 626, 639-640 (1999), the court said:

> This Court has repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney. See *Prince v MacDonald*, 237 Mich App 186, 189; 602 NW2d 834 (1999); *Carpenter v Consumers Power Co.*, 230 Mich App 547, 556-557; 584 NW2d 375 (1998); *Brenner v Kolk*, 226 Mich App 149, 159-160; 573 NW2d 65 (1997); *Cummings v Wayne Co.*, 210 Mich App 249, 252; 533 NW2d 13 (1995); *People v Taylor*, 159 Mich

> App 468, 471, n 4; 406 NW2d 859 (1987). In addition, our Supreme Court has "recognized the inherent power of a court to control the movement of cases on its docket by a variety of sanctions." *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963). Furthermore, MCL 600.611; MSA 27A.611 provides, "Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments."

(Footnote omitted.)

It is true that the sanctions in the *Persichini* case consisted only of monetary costs. Nevertheless, one of the cases cited by the court, *Cummings v Wayne County*, approved the dismissal of the lawsuit for misconduct, as the *Persichini* court itself observed.

The plaintiff says that the misconduct involved in *Cummings* consisted of threats and intimidation against witnesses, and that such conduct is more egregious than that involved in the case at bar. That is true. But the defendants are not required to wait until the plaintiff should threaten witnesses before seeking dismissal of her case. It is quite enough that she and her attorneys should premeditatedly threaten the integrity of the judicial process in a different fashion.

Besides the inherent power of the court, there is sufficient authority in the court rules themselves for the grant of a dismissal or a default in appropriate cases. MCR 2.504 grants general authority fo the court to dismiss an action for failure of a plaintiff to comply with the rules or a court order. MCR 2.313 affords a court the authority to grant a dismissal or a default for the failure to provide discovery. In the latter case, that authority is not merely theoretical. *Chrysler Corporation v Home Insurance company*, 213 Mich App 610 (1995); *Humphrey v Adams*, 69 Mich 577 (1976); *Krim v Osborne*, 20 Mich App 237 (1969). When it is clear that a court can grant the ultimate sanction of dismissal or default for the failure to

provide discovery, there can be no genuine question that the court can do so on account of the more serious misconduct involved in the case at bar.

Finally, plaintiff argues that a dismissal is premature because we have not yet gone through the *voir dire* to determine whether we can empanel a jury that has not been exposed to the publicity. Our first observation is that, while *voir dire* is a useful implement for selecting a fair jury, it is not a perfect one. More important, however, is that the plaintiff should not be heard to make her argument, which goes like this: "We deny that our behavior was intended to have a substantial likelihood of prejudice. But even if you establish that it was, you cannot dismiss the plaintiff's case until you establish that it has achieved its intended effect."

We believe otherwise. That is not an acceptable standard for preserving the integrity of a court system. The behavior in question has been intentional, premeditated, and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect.

B. Discourteous Conduct Toward the Tribunal.

The defendants invoke Michigan Rule of Professional Conduct 3.5, "Impartiality and Decorum of the Tribunal" which provides that a lawyer shall not . . . "(c) engage in undignified or discourteous conduct toward the tribunal." Because, in the end, we do not base the dismissal of plaintiff's action on this ground, it is unnecessary to enumerate here the acts of disrespect and the charges of corruption made by the plaintiff and her counsel against the judges who have presided over this action. They are set forth in defendants' briefs and in the attachments. We do note, however, that, not satisfied with attacking those judges, counsel has seen fit more recently to enlarge the scope of the accusations against the judiciary. In a

television interview broadcast on July 3, 2002, on Channel 4, WDIV, Miranda Massie said to the camera:

> "Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exits in those plants, and we've found it hard to get unbiased judicial rulings in these cases."

One will have to ask Ms. Massie whether the reference to "Metro Detroit" was intended to apply only to the judges of Wayne County, or to all judges in the metropolitan area. However many she may have intended to indict, there is nothing in the record to support such charges; except, supposedly, that two judges made evidentiary rulings not to the liking of the plaintiff.

Nevertheless, while we will not suggest that abusive conduct of counsel toward the judiciary can never justify the dismissal of an action, it does not seem appropriate to sanction the plaintiff on that ground where, as here, there is no showing that that aspect of counsel's conduct would be likely to deprive the defendants of a fair trial. If it is suggested that such conduct amounts to professional misconduct, that proposition is more appropriately examined elsewhere, if at all.

For the reasons stated in part A of this opinion, this action is dismissed with prejudice.

/s/ William J. Giovan
William J. Giovan
Circuit Judge

Dated: August 21, 2002.

BEST AVAILABLE COPY

Fire Wixom Superintendent Dan Bennett and all other sexual predators at Ford!

No sexual harassment of women workers at Ford!

Ford Motor Company claims to have a policy of "Zero Tolerance" for sexual harassment, but in reality, it has a policy of "Zero Tolerance" for *complaints* about sexual harassment by women workers.

Dan Bennett, a production supervisor at Ford's Wixom Assembly plant, has repeatedly sexually harassed and abused numerous women at the plant. Over and over he has exposed himself to women in the plant. Over and over he has groped and assaulted women. He was convicted of committing his signature crime against three high school girls while driving beside their car on I-275 in 1995—exposing his penis and gesturing for the young women to get off the highway. Dan Bennett was in a company car Ford was notified by the police.

Ford has known about this pattern of sexual attack by this supervisor for years and has done nothing to protect the women who work at Ford. It is an unspeakable scandal that Ford motor company has yet to fire Dan Bennett—to this very day he receives a $150,000 paycheck from Ford despite his numerous victims.

But Ford has done *much worse than nothing.* They have systematically suppressed any attempt by the women to stop the sex discrimination and sexual abuse. Women workers and managers who come forward are harassed, persecuted, threatened and silenced.

Justine Maldonado is one of the workers who was victimized by Dan Bennett. Since coming forward and publicizing her story, Justine has been subjected to a campaign of slander including the most invasive and perverse personal investigation by Ford's company men. They have dug up *her high school report cards;* they have traveled across the country to ask an ex-boyfriend about *her personal sexual fantasies.* Justine Maldonado has sued Ford and has raised her voice against this mistreatment of women in Ford's factories. Ford has responded by putting her on trial. In contrast they have barely lifted a finger to investigate Dan Bennett. Now she is the victim not only of the supervisor whom Ford has steadfastly defended, she is the victim of Ford's policy of persecuting women who come forward with cases of abuse.

Justine is not intimidated. She intends to get justice. She intends to see the pattern of abuse, harassment and intimidation of women at Ford put to an end.

We are picketing in solidarity with Justine Maldonado and all women for whom she speaks. We demand justice for Justine Maldonado, the other victims of Dan Bennett and all the women workers of Ford.

Members of the Justice for Justine Committee attended the last hearing in Justine Maldonado's case. In that hearing we heard the judge say "This case will not be about social reform..." in other words, putting a stop to the abuse of women at Ford. Despite what the judge says, that is *exactly* what this case is about.

Wayne County Circuit Court Judge William Giovan, the judge in Justine's case, is in Ford's pocket. Ten other women have come forward who have been victimized by Dan Bennett. The judge is refusing to allow any of these women, including one of the women who was victimized by Mr. Bennett as a high school student, to testify in Ms. Maldonado's case. "Judge Giovan is trying to keep the truth out of the courtroom. He is refusing to let even one of the other women who was victimized by Dan Bennett testify in Ms. Maldonado's case" said Shanta Driver, member of the Justice for Justine Committee.

Justine Maldonado said, "I am making this fight for all the women who are discriminated against and sexually harassed in Ford plants. This is a fight to protect every woman's right to go to work and earn a decent living without facing perversion, stalking and sexual abuse on a daily basis. Ford has tried to take away my dignity and now judge Giovan is trying to deprive me of my right to speak. Justice requires that the truth be told."

The judge is trying to gag the victims of sexual harassment and their lawyers to keep the truth from coming out about the gross injustice that Ford has been perpetrating.

We will not be suppressed. Injustice perpetrated too long breads fearlessness. Ford thinks that Detroit is its Company Town and that it can use its influence and power to get Judge Giovan to exclude evidence that is necessary to get justice for women at Ford. Ford thinks they are above the law. They treat workers and the community of Southeast Michigan with arrogance and abusive contempt. We intend to put a stop to that.

Attend the trial! Stop discrimination against women workers at Ford!

Trial begins Monday, July 8, 2002 at 9am.

City County Building, Woodward Avenue at Jefferson in Detroit. Judge William J. Giovan's courtroom 15th floor.

For more information call 313.506.9414 or email justiceforjustine@hotmail.com.

Justice for Justine Committee.

Picket and Press Conference at Ford Motor Company World Headquarters

4PM Wednesday, June 26, 2002
North side of Michigan Ave just East of the Southfield Freeway.

Picket for women's equality at Ford! Stop sexual harassment of women workers at Ford! Fire Supervisor Dan Bennett!

Ford Motor Company claims to have a policy of "Zero Tolerance" for sexual harassment, but in reality, it has a policy of "Zero Tolerance" for *complaints* about sexual harassment by women workers.

Dan Bennett, a production supervisor at Ford's Wixom Assembly plant, has repeatedly sexually harassed and abused numerous women at the plant. Over and over he has exposed himself to women in the plant. Over and over he has groped and assaulted women. He was convicted of committing his signature crime against three high school girls while driving beside their car on I-275 in 1995—exposing his penis and gesturing for the young women to get off the highway. Dan Bennett was in a company car Ford was notified by the police.

Ford has known about this pattern of sexual attack by this supervisor for years and has done nothing to protect the women who work at Ford. It is an unspeakable scandal that Ford motor company has yet to fire Dan Bennett—to this very day he receives a $150,000 paycheck from Ford despite his numerous victims.

But Ford has done *much worse than nothing.* They have systematically suppressed any attempt by the women to stop the sex discrimination and sexual abuse. Women workers and managers who come forward are harassed, persecuted, threatened and silenced.

Justine Maldonado is one of the workers who was victimized by Dan Bennett. Since coming forward and publicizing her story, Justine has been subjected to a campaign of slander including the most invasive and perverse personal investigation by Ford's company men. They have dug up *her high school report cards*, they have traveled across the country to ask an ex-boyfriend about *her personal sexual fantasies.* Justine Maldonado has sued Ford and has raised her voice against this mistreatment of women in Ford's factories. Ford has responded by putting her on trial. In contrast they have barely lifted a finger to investigate Dan Bennett. Now she is the victim not only of the supervisor whom Ford has steadfastly defended, she is the victim of Ford's policy of persecuting women who come forward with cases of abuse.

Justine is not intimidated. She intends to get justice. She intends to see the pattern of abuse, harassment and intimidation of women at Ford put to an end.

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Justine Maldonado said, "I am making this fight for all the women who are discriminated against and sexually harassed in Ford plants. This is a fight to protect every women's right to go to work and earn a decent living without facing perversion, stalking and sexual abuse on a daily basis. Ford has tried to take away my dignity and now judge Giovan is trying to deprive me of my right to speak. Justice requires that the truth be told."

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Call Tanya Troy at 313.506.9414 for more information or email justiceforjustine@hotmail.com.

Justice for Justine Committee.

26 June 2002

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FOR IMMEDIATE RELEASE—SEPTEMBER 11, 2001
New sexual harassment lawsuits against Ford and serial abuser of women at Wixom Assembly Plant; motion for disqualification of judge for bias

CONTACT: Miranda Massie (313) 510-5971

I addict to women
Paid suspend w/o

On Thursday, September 13, at 1:00 p.m., women employees of Ford who have been subjected to **extreme and abusive sexual harassment** by Ford Superintendent Daniel Bennett will hold a press conference at the offices of their legal team at Scheff & Washington, PC, 3800 Cadillac Tower, Detroit. They will be joined by members of the legal team, by a retired male Ford manager, and by a young woman who, along with two of her friends, pressed criminal charges against Bennett in 1995. The women will announce the filing of two new lawsuits against Bennett and Ford and of a **motion to disqualify the judge** who recently presided over a related trial against Bennett and Ford.

The week before last, Judge Kathleen MacDonald of the Wayne County Circuit Court prevented a jury from deciding a case against Bennett and Ford for Bennett's abusive sexual harassment of a woman employee at Ford's Wixom Assembly Plant. Judge MacDonald had earlier kept the same jury from hearing crucial evidence about Bennett's criminal conviction for a work-related sexual crime, and had prevented another female Wixom employee who was victimized by Bennett's sexual harassment from testifying.

The woman whose case was dismissed—who has asked that her name not be used and who was represented by different counsel—will be appealing. A pending case against Bennett and Ford will be going to trial soon. There is an appeal in the Michigan Supreme Court challenging Judge MacDonald's efforts to keep the jury from hearing the whole truth. In addition, the filing of two new cases against Bennett and Ford will be announced on Thursday, as will the filing of a motion to disqualify Judge MacDonald.

So far, sworn testimony by witnesses has set forth the following about Dan Bennett and Ford (and this is only a selection):

--In 1995, Bennett used a Ford M-10 car to stalk three young women on I-275 and expose himself to the terrified young women as he drove next to their car at high speed. Bennett was **arrested, prosecuted and convicted of indecent exposure**—but Ford did nothing to stop him even though it knew about his crime within hours after it occurred.

--In 1995, Bennett exposed himself to the woman employee whose case the judge just took from the jury in the railyard of the Wixom plant, demanding that she perform sexual acts

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upon him. For years, he continued to make obscene gestures and comments to her. When she complained to Ford, he followed her at high speed on the highway. Ford has done nothing to stop or punish Bennett even though it has known of this harassment for two years.

--In January-February 1998, Bennett twice exposed himself to employee Justine Maldonado in a remote area of the Wixom plant, demanding that she perform sexual acts upon him. In June 1998, he followed her from I-275 into a parking lot, where he demanded that she perform sexual acts on him and masturbated as she drove away. She complained repeatedly. Despite the fact that Ford has known of her charges for years, it did not investigate them before she filed suit, nor has it ever punished Bennett for his actions.

--In fall 1998, Bennett twice grabbed and attempted to forcibly kiss cafeteria employee Milissa McClements in the Wixom plant. Ford has not punished Bennett for these acts. (McClements has not yet testified; these are the only events listed here which are not yet the subject of sworn testimony.)

--In 1999, Bennett grabbed and attempted to forcibly kiss another woman, a Ford employee, in an office at the Wixom plant. Ford has not punished Bennett for these acts.

--In August 1999, in his office at the Wixom plant, Bennett offered Ford employee Pamela Perez money for sex in a motel room. When she refused, he exposed himself and told her she could keep the money for herself if she "took care of him." Ford has not punished Bennett for these acts. (Judge MacDonald prevented Perez from testifying in the recent trial.)

The coverup

In January 2001, Judge MacDonald ruled that the jury would not be allowed to hear that in 1995, Bennett was convicted for stalking and then exposing himself to the three young women as he drove a Ford test car for evaluation purposes. Despite the fact that Ford knew of this work-related crime and did nothing whatever to discipline Bennett for it, Judge MacDonald ruled that the evidence would be excluded because it was "too prejudicial" to Ford.

In the first trial, Judge MacDonald refused to let Ford employee Pamela Perez testify at trial about Dan Bennett offering her money for sex and then exposing himself while demanding that she "take care of him" in his office at the Wixom plant. Despite these rulings, the first jury heard substantial evidence as to Bennett's sexual attacks on women at the Wixom plant. But before the jury could rule, Judge MacDonald dismissed the case *on the basis that there was not enough evidence.*

Justine Maldonado's attorneys have filed a motion to disqualify Judge MacDonald from hearing Maldonado's pending sex harassment case against Bennett and Ford. They have also appealed her exclusionary evidence ruling to the Michigan Supreme Court.

On Thursday, the women and their supporters will tell their stories and express their determination to fight until the routine degradation of women employees at Ford ends.

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

U.S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

MICHIGAN STATUTES

MCL 600.611

Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments.

* * * *

MCL 780.623

Sec. 3. (1) Upon the entry of an order pursuant to section 1, the court shall send a copy of the order to the arresting agency and the department of state police.

(2) The department of state police shall retain a nonpublic record of the order setting aside a conviction and of the record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. Except as provided in subsection (3), this nonpublic record shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:

(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.

(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside pursuant to this act.

(c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.

(d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.

(e) Consideration by a law enforcement agency if a person whose conviction has been set aside applies for employment with the law enforcement agency.

(f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act has violated that act, or for use in a prosecution for violating that act.

(3) A copy of the nonpublic record created under subsection (2) shall be provided to the person whose conviction is set aside under this act upon payment of a fee determined and charged by the department of state police in the same manner as the fee prescribed in section 4 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.234 of the Michigan Compiled Laws.

(4) The nonpublic record maintained under subsection (2) is exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(5) Except as provided in subsection (2), a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.

* * * *

MICHIGAN COURT RULES

MCR 2.504(B)(1)

(B) Involuntary Dismissal; Effect.

(1) If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant.

* * * *

MICHIGAN RULES OF PROFESSIONAL CONDUCT

Rule 1.2. Scope of Representation.

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

* * * *

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or

(c) engage in undignified or discourteous conduct toward the tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Michigan Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

* * * *

Rule 3.6 Trial Publicity

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Comments

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about

a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. Moreover, the confidentiality provisions of Rule 1.6 may prevent the disclosure of information which might otherwise be included in an extrajudicial statement. In addition, special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

For guidance in this difficult area, one may consider the following language adapted from the American Bar Association's Model Rule 3.6:

> (a) A statement referred to in Rule 3.6 ordinarily is likely to have such a prejudicial effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> > (1) the character, credibility, reputation or criminal record of a party, of a suspect in a criminal investigation or of a witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding Rule 3.6 and paragraphs (a)(1-5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

* * * *

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice;

(d) state or imply an ability to influence improperly a government agency or official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good-faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law. See also Rule 3.4(c).

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and such as officer, director, or manager of a corporation or other organization.

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No. 06-667

IN THE

Supreme Court of the United States

JUSTINE MALDONADO,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The trial court dismissed petitioner's lawsuit as a sanction for the flagrant misconduct of petitioner and her counsel, who together deliberately and repeatedly publicized through the media, shortly before anticipated trial dates, prejudicial information that the court had ruled inadmissible. The trial court found that petitioner and her counsel acted willfully and for the purpose of tainting the potential jury pool.

The question presented is whether the Michigan Supreme Court correctly held that the dismissal of petitioner's lawsuit did not violate the Free Speech Clause of the First Amendment.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

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IN THE

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No. 06-667

JUSTINE MALDONADO,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

Respondent Ford Motor Company ("Ford") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the Michigan Supreme Court.

INTRODUCTION

In this case, the trial court dismissed with prejudice petitioner's lawsuit against Ford as the sanction for the flagrant litigation misconduct of petitioner and her counsel. The misconduct consisted of, in the Michigan Supreme Court's words, "[petitioner] and her attorneys repeatedly and intentionally publiciz[ing] inadmissible evidence so as to taint the potential jury pool, deny [respondent] a fair trial, and frustrate the due administration of justice." Pet. App. 2a. After

the trial court ruled that the prior conviction of a Ford employee was not admissible in petitioner's sexual harassment suit, petitioner and her lawyers repeatedly used press releases and media interviews to expose potential jurors to that prejudicial inadmissible information. The trial court found that the conduct of petitioner and her counsel was "intentional, premeditated, and intransigent." *Id.* at 92a.

In an effort to stave off dismissal, petitioner seeks to wrap herself in the cloak of the First Amendment. The Michigan Supreme Court rejected the notion that freedom of speech gives a litigant and her agents an unfettered right to broadcast inadmissible evidence before trial for the purpose of denying her adversary a fair trial. Although petitioner would have the Court view this as "a First Amendment case" in which she was punished for exercising her right to speak, it is in truth a case about the solemn obligation of attorneys and their clients to abide by ethical rules and evidentiary rulings and the need for trial courts to be able to sanction misconduct threatening the integrity of the proceedings. *See id.* at 1a ("In this case we consider the essential authority of trial courts to control the proceedings before them."). In *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991), this Court held that the First Amendment does not nullify the rules of professional responsibility or the power of trial judges to police conduct of lawyers and litigants undermining the right to a fair trial—a constitutional right every bit as fundamental as freedom of speech—under the same ethical standard applied by the Michigan Supreme Court.

Because the decision below involves a fact-bound application of settled precedent, conflicts with no decision of any other court, and properly rejected petitioner's First Amendment claim, the Court should deny the petition.

COUNTERSTATEMENT

The Proceedings in the Trial Court

In June 2000, petitioner filed a state-law sexual harassment lawsuit against Ford and Daniel Bennett, alleging that Bennett had sexually harassed her. Pet. App. 3a.[1] Ford subsequently filed a motion *in limine* to exclude from trial evidence of Bennett's 1995 conviction for indecent exposure. *Id.*[2] The trial judge, Judge Kathleen Macdonald, granted the motion and entered an order dated February 16, 2001 excluding evidence of Bennett's prior conviction. *Id.*

Petitioner asserts that Judge Macdonald's order only "tentatively" excluded the evidence of Bennett's prior conviction and that "the ruling was not final." Pet. 24. These assertions are flat wrong. Judge Macdonald expressly stated that "[t]his was not a provisional ruling. This was a ruling. The motion was grant[ed] as to Mr. Bennett and to Ford Motor." Tr. of Feb. 16, 2001 Hrg. at 7. The order of exclusion took effect on February 16, 2001, and remained in effect continuously throughout the case. Indeed, based on the order, Judge Macdonald directed petitioner to file an amended complaint omitting all references to the conviction.

That order applied both in this case and in another case against Ford, pending in the same court before the same

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[1] Petitioner and Bennett are both former employees of Ford. Ford removed Bennett from the workplace in June 2000, and he never returned to work at Ford.

[2] As the Michigan Supreme Court noted, Bennett's 1995 conviction was based on conduct that took place "while Bennett was not at work and involved individuals with no connection to Ford." *Elezovic* v. *Ford Motor Co.*, 697 N.W.2d 851, 863 (Mich. 2005). Ford, of course, does not condone the conduct underlying that conviction. Its meritorious motion to exclude the conviction from evidence was necessary to protect its right to receive a fair trial of petitioner's claims, and the trial court's ruling is not at issue here.

judge, also involving Bennett's alleged workplace misconduct and in which petitioner was a plaintiff's witness ("the *Elezovic* case"). Pet. App. 3a.[3] Both the Michigan Court of Appeals and the Michigan Supreme Court denied petitioner's attempted interlocutory appeal of the trial court's evidentiary ruling. *Id.* at 3a-4a. Judge Macdonald directed a verdict against the plaintiff in the *Elezovic* case on August 30, 2001.

On September 11, 2001, as an initial trial date approached, petitioner's counsel issued a press release referring to Bennett's prior conviction and the trial court's order excluding that evidence from trial. *Id.* at 4a. In issuing the press release, petitioner's counsel knew, as the press release itself stated, that the case "will be going to trial soon." *Id.* at 96a. The September 11 press release resulted in a series of news broadcasts and print media publications "replete with references to Bennett's prior conviction." *Id.* at 4a. *See id.* at 4a n.5 (listing seven publications stemming from the September 11 press release). As the court below found, "it was [petitioner]'s counsel's press release that prompted the mass of publications." *Id.*

Petitioner subsequently moved to recuse Judge Macdonald; as a result, Judge Macdonald delayed petitioner's trial pending resolution of the recusal motion. *Id.* at 62a. In November 2001, Bennett's indecent exposure conviction was expunged. *Id.* at 5a. In January 2002, the trial court established a trial date of July 8, 2002. *Id.* In February 2002, Judge Macdonald rotated to another division of the court, and the case was reassigned to Judge William Giovan. *Id.*

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[3] At Judge Macdonald's direction, all of the witnesses in the *Elezovic* case—including petitioner—signed a statement "indicating that they had been advised of the court's ruling regarding inadmissible evidence, that they were not to mention any excluded evidence, and that they understood that sanctions would result from mentioning any excluded evidence." Pet. App. 3a n.2.

On May 17, 2002, Judge Giovan held a hearing, following which he met with all counsel to discuss petitioner's counsel's public references to Bennett's conviction. *Id.* Bennett's counsel noted that petitioner's counsel's conduct violated the state expungement statute, Mich. Comp. Laws § 780.623(5) (Pet. App. 100a), which makes it a criminal offense to "divulge[ ], use[ ] or publish[ ] information concerning" an expunged conviction. Pet. App. 5a-6a. Petitioner's counsel "responded by stating that 'it was worth the risk' to continue to publicize Bennett's expunged conviction." *Id.* at 6a. Judge Giovan declined expressly to order petitioner's counsel to obey § 780.623(5) because "he considered it redundant to order an attorney to follow the law." Pet. App. 6a.[4]

Petitioner's counsel had invited the media to the May 17 hearing. *Id.* at 5a. When Judge Giovan met privately with counsel, petitioner's counsel asked the media to wait outside the courtroom until the meeting was over. *Id.* Following the meeting, petitioner's counsel met with the waiting media. *Id.* at 6a. "This meeting resulted in extensive television news and press coverage, some of which again referred to Bennett's expunged conviction." *Id.* *See id.* at 6a n.9 (listing three publications stemming from the May 17 meeting with the media).

Petitioner's counsel continued to discuss the case in public—at a May 28, 2002 public meeting and a June 1, 2002 rally at the University of Michigan sponsored by the Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary, or "BAMN." *Id.* at 6a-7a. *See also* BAMN, *Third National*

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[4] Petitioner disputes the content of the meeting, claiming that the only outcome was that "the trial judge refused to rule on the validity of the [expungement] statute." Pet. 5. This is incorrect. Petitioner never sought a ruling on the statute's validity, and the "worth the risk" statement made by petitioner's counsel was indeed placed on the record. Tr. of July 8, 2002 Hrg. at 95.

Conference of the New Civil Rights Movement—Agenda (reflecting that petitioner and her attorney were scheduled to speak at the rally from 1:00-2:30 p.m.).

Following these public appearances, petitioner moved to dissolve the order that Judge Macdonald had entered excluding Bennett's prior conviction. Pet. App. 7a. Judge Giovan denied the motion, stating that "it is not a close case" and that "I'm not going to change Judge Macdonald's decision on this point." Tr. of June 21, 2002 Hrg. at 23, 25.

During the hearing on the motion, Bennett's counsel mentioned an article that had recently been published on the front page of the *Metro Times*, a free weekly publication readily available in the courthouse where jury selection was imminent. Pet. App. 7a. The following colloquy then occurred:

> THE COURT: But, you know, since you mentioned that article, where is this coming from? I thought that there is a prohibition against counsel speaking to—making public statements designed to affect litigation.
>
> MS. HARDY [Ford's counsel]: There certainly is. There's an ethics rule which prohibits counsel from intentionally trying to taint a jury pool by making the public aware of excluded evidence, which is exactly what's been occurring for quite some time.
>
> THE COURT: Is counsel being quoted in this?
>
> MR. WASHINGTON: I think counsel on both sides. Ford was not, but Mr. Morgan and Ms. Massie and I were both quoted, all quoted.
>
> THE COURT: I'm not sure—well—
>
> MS. HARDY: It was initiated, without doubt, and Mr. Washington will not dispute this, by Mr. Washington, as all the press has been initiated by his office, and the constant publicity is one issue, but the really serious issue is the effort by Mr. Washington to make sure that the press continues to report evidence or information concerning

this expunged conviction so that some way, somehow, irrespective of this Court's ruling—

THE COURT: I'm not making any decisions about this, but I'm going to tell you one thing. *If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss this case with prejudice*, or, and I should say, on the other side, grant a default judgment. *I just want everyone to know that.* And then whatever counsel is involved can answer to their client. [Tr. of June 21, 2002 Hrg. at 29-30 (emphases added); *see also* Pet. App. 7a-9a.]

Petitioner was present in the courtroom when the court issued this warning. Thus, the court clearly put both petitioner and her counsel on notice that any violation of ethical obligations relating to publicizing inadmissible evidence could result in dismissal of the case with prejudice.

Three days later, on June 24, 2002, petitioner in her deposition "admitted that she had disclosed facts regarding Bennett's expunged conviction despite the trial court's order disallowing such evidence." Pet. App. 9a. Petitioner said she had disclosed the conviction upwards of 100 times:

[Defense counsel]: If you can give me a ballpark figure, how many times since you found out about the expungement have you told other people about the fact that Mr. Bennett had this conviction that was later expunged?

* * *

[Petitioner]: I have no idea. It's been a lot.

Q: Over 100?

A: I don't know.

Q: Over ten?

A: Oh, definitely over ten, possibly over 100.

Q: Okay.

> A: If I could get it out on the Internet, I would put it out on the Internet. [*Id.*[5]]

Petitioner also testified that she would not stop her campaign to publicize widely Bennett's expunged conviction:

> I'm aware that you're whining and crying because I'm talking about it all over town, yes, I am aware of that. I won't shut up about it. It's the truth. You can expunge it, but it's the truth, and I'm going to tell it, and you know what? I will tell anybody that will listen because this man is a menace and must be stopped, and you know it and you know it [sic]. But you guys want to protect him, that's fine, I'm not. I don't have to protect Mr. Bennett. [*Id.* at 10a.]

On June 26, 2002—two days after petitioner's deposition and just twelve days before the trial date—petitioner and one of her attorneys participated in a "Justice for Justine Committee" demonstration outside Ford headquarters. *Id.* At the demonstration, leaflets were distributed to the public containing information about Bennett's expunged conviction. *Id.* The leaflets also stated that Judge Giovan "is in Ford's pocket" and "is trying to keep the truth out of the courtroom." *Id.* A similar demonstration was held, and similar leaflets were distributed, the next day at the Ford Wixom plant. *Id.* at 11a. The demonstrators succeeded in garnering press attention. *See id.* at 11a n.12 (listing three publications stemming from the June 26 and 27 demonstrations).

In an interview televised the same day as the demonstration at Ford headquarters, petitioner demonstrated a clear awareness of the potential consequence of her decision to continue

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[5] Petitioner discovered how to "put it out on the Internet." *See* http://www.participate.net/node/208 (last visited January 3, 2007) ("My name is Justine and I am the woman in the case below."). This weblog—dated October 11, 2005—contains a chronology publicizing the facts underlying Bennett's expunged conviction.

publicizing the expunged conviction despite the warning given by Judge Giovan at the June 21 hearing. She stated:

> If we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me, because I'm not going to quit fighting against sexual harassment. [*Id.* at 10a.]

On June 28, 2002, Ford moved to dismiss petitioner's lawsuit on the ground that petitioner and her counsel had engaged in improper pretrial publicity aimed at tainting the potential jury pool. *Id.* at 11a.[6]

On July 8, 2002, at the hearing on Ford's motion to dismiss, "[petitioner] and her counsel were discourteous to and uncooperative with the court." *Id.* at 12a. For example, one of petitioner's attorneys—in response to the court's question whether she was a member of the "Justice for Justine Committee" that had publicized the excluded conviction twelve days before trial—stated "[n]obody's ever asked me that in my life" and then, interrupting the court, stated "I mean, have I or have I ever been a member of the Communist Party, is

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[6] In response, petitioner on July 1, 2002, moved to disqualify Judge Giovan; Judge Giovan denied the motion, and the chief judge affirmed that ruling, Pet. App. 11a, which was upheld by the Michigan Court of Appeals on that ground that it saw "nothing in the record [that] indicates that Judge Giovan acted with prejudice or impropriety." *Id.* at 76a-77a.

On July 3, 2002, the day the disqualification motion was denied, one of petitioner's attorneys gave a television interview in which she stated: "Metro Detroit has a company town feeling, and it's hard to get a fair hearing from any of these judges when you're going against the Ford Motor Company. They'll stop at nothing to maintain the culture of abuse that exists in those plants, and we've found it hard to get unbiased judicial rulings in these cases." *Id.* at 11a. This interview generated still more media coverage. *See id.* at 11a n.13 (listing two publications resulting from the interview).

that what this is?" Tr. of July 8, 2002 Hrg. at 114; Pet. App. 12a. Following the court's question whether members of the organization were in court, the same attorney said "[h]ave you guys even ever heard of the phrase 'Freedom of association?' " Tr. of July 8, 2002 Hrg. at 117; Pet. App. 12a. The attorney also turned to the "Justice for Justine Committee" members present in the courtroom and remarked "[w]ho did you guys vote for in the last judicial election?" *Id.*

The same attorney belittled Ford's motion to dismiss as "12 pages of tripe," "very frivolous" and "frankly stupid." Tr. of July 8, 2002 Hrg. at 102, 104. Earlier in the hearing, she indicated that she saw nothing wrong with petitioner's June 26 television interview. The attorney stated that "contrary to being lambasted for it, she [petitioner] should be commended for not stopping despite whatever Judge might rule in any way that she disagrees with." *Id.* at 97.

Another of petitioner's attorneys, during the same hearing, was similarly disrespectful to the court, saying "Judge Giovan, I haven't been accused of lying since my age was in the single digit. But I'll tell you something, I don't give a fig, because whatever you may think of my dishonesty, you can multiply that by 10." Tr. of July 8, 2002 Hrg. at 18. Her rude behavior included interruption of the Court's questioning. *See id.* at 15 ("THE COURT: Do you mind if I finish my—. MS. MASSIE: (Interposing) You didn't give me a chance to reply to Ms. Hardy.").

On August 21, 2002, the trial court dismissed petitioner's lawsuit with prejudice, agreeing with Ford's argument that

> both [petitioner] herself and her attorneys have intentionally and repeatedly disseminated the proscribed evidence through the public media when they knew or should have known that the information would have a substantial likelihood of tainting the trial of this action. [Pet. App. 83a.]

The trial court concluded that the behavior of petitioner and her attorneys "has been intentional, premeditated, and

intransigent. It was designed to reach the farthest boundaries of the public consciousness." *Id.* at 92a. *See also id.* at 89a (referring to "the willfulness of their conduct"). The trial court based its ruling in large part on Mich. R. Prof. Conduct ("MRPC") 3.6:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. [Pet. App. 103a.]

In well-supported factual findings, the trial court found that petitioner "publicly disclosed the fact of [Bennett's] conviction many times"; that she "made these public disclosures while aware of Judge Macdonald's exclusionary order" and while "aware of the illegality of such disclosures"; and that "nothing will deter [petitioner] from continuing to publicly broadcast that information." *Id.* at 83a, 84a, 85a.

The trial court also concluded that petitioner's counsel had much "to answer for themselves." *Id.* at 87a. Among other things, the court found that on September 11, 2001, petitioner's counsel issued a press release "which made several explicit references to Mr. Bennett's criminal conviction, the underlying conduct involved, and to the fact that Judge Macdonald had excluded these from evidence" and did so "while believing that the trial was imminent." *Id.* The court found that petitioner's attorneys provided to a reporter the "extensive information * * * about Mr. Bennett's conviction and the underlying behavior" that appeared in the front-page story in the *Metro Times* in June 2002—a charge that petitioner's lawyers did "not deny." *Id.* at 88a. The court also noted that MRPC 8.4(a) prohibited petitioner's counsel from acting together with petitioner or anyone else to effectuate the prejudicial pretrial publicity. *Id.*

The Decision of the Michigan Court of Appeals

In April 2004, the Michigan Court of Appeals affirmed in part, reversed in part, and remanded in part. *Id.* at 60a-80a. It held that the trial court "possessed the legal authority to dismiss [petitioner]'s complaint with prejudice on the basis that [petitioner] and her attorneys intentionally and repeatedly disclosed excluded evidence through the public media for the purpose of tainting the jury pool so as to deny [Ford] a fair trial." *Id.* at 67a. The court remanded the case, however, on the ground that the trial court "did not conduct an extensive evidentiary hearing to specifically determine whether the conduct of [petitioner] and her attorneys caused any prejudice to [Ford's] right to a fair trial." *Id.* at 69a.

The Court of Appeals also ruled, following *Elezovic* v. *Ford Motor Co.*, 673 N.W.2d 776 (Mich. Ct. App. 2003), *aff'd in part & rev'd in part*, 697 N.W.2d 851 (Mich. 2005), that the trial court had properly and without committing error excluded evidence of Bennett's prior conviction. Pet. App. 70a-72a. Although the Michigan Supreme Court declined to review the issue in petitioner's case, that court ultimately upheld, in the *Elezovic* case, the original ruling that Bennett's prior conviction was inadmissible. *See Elezovic* v. *Ford Motor Co.*, 697 N.W.2d 851 (Mich. 2005). The court held that the expungement statute, Mich. Comp. Laws § 780.623(5), made the fact of the conviction itself inadmissible. *Elezovic*, 697 N.W.2d at 863. The court also held that the "facts that led to the conviction" could not be admitted to show that Ford knew its work environment was hostile because the conviction "occurred while Bennett was not at work and involved individuals with no connection to Ford." *Id.* The court "question[ed] how Ford's knowledge of Bennett's improper off-site behavior involving nonemployees could constitute notice to Ford that plaintiff's work environment was sexually hostile." *Id.*

The Decision of the Michigan Supreme Court

The Michigan Supreme Court reversed the Court of Appeals' judgment and reinstated the order dismissing petitioner's complaint. Pet. App. 3a, 30a. The Supreme Court held that the trial court had authority, as a matter of Michigan law, to impose such a sanction for the misconduct of a party and her attorneys and that the trial court had properly exercised its discretion on the facts here. As the court stated:

> [Petitioner] and her counsel engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means. They continued to do so even after the trial court explicitly warned them that such misconduct would result in the dismissal of [petitioner]'s lawsuit. [*Id.* at 18a.]

The Michigan Supreme Court concluded that the trial court "chose a principled option in dismissing [petitioner]'s case in order to protect the administration of justice," adding that "[t]he imposition of any lesser sanction would have been unjust in light of [petitioner]'s and her counsel's flagrant misbehavior." *Id.* at 21a.

The Michigan Supreme Court also rejected petitioner's First Amendment argument—the only federal issue in the case. *Id.* at 24a-28a. Carefully applying this Court's opinion in *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991), the court below held that the dismissal of petitioner's lawsuit did not violate the freedom of speech. In so holding, the court correctly recognized that the speech at issue "was substantially likely to have a materially prejudicial effect and * * *, therefore, violated the rules of ethics." Pet. App. 26a. It also observed, again quite correctly, that the trial court's rulings "were necessary to protect [Ford's] fundamental right to a

fair trial and were directly aimed at protecting potential jurors from prejudice." *Id.* at 27a.[7]

REASONS FOR DENYING THE WRIT

It should be noted at the outset that a number of the rulings made below are not at issue in this Court, for they involve questions of state law. *See Dixon* v. *Duffy*, 344 U.S. 143, 144 (1952) ("This Court, of course, does not sit to determine matters of state law"). Those include (1) the ruling—made by the trial court, affirmed by the Michigan Court of Appeals, and settled by the Michigan Supreme Court in the *Elezovic* case—that Bennett's prior conviction was inadmissible, and (2) the Michigan Supreme Court's ruling that the dismissal of petitioner's case as a sanction for the deliberate, repeated, and flagrant misconduct of petitioner and her attorneys was a lawful and proper exercise of the trial court's discretion as a matter of Michigan law. The only *federal* question before this Court is whether the dismissal violated the First Amendment. That question does not warrant review by this Court, for a number of compelling reasons.

I. THE QUESTION WHETHER THE COURT BELOW PROPERLY APPLIED *GENTILE* ON THE UNUSUAL FACTS OF THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW.

The First Amendment question raised in this case is a quite narrow one, because there is no dispute as to the proper test to be applied to answer that question in this context. Under this Court's decision in *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030 (1991), the question is whether the extra-judicial speech at issue is substantially likely to have a materially

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[7] Petitioner suggests that the Michigan Attorney Grievance Commission exonerated her counsel of any ethical wrongdoing. *See* Pet. 21 n.8. That is incorrect. The Commission simply made a decision to allocate scarce prosecutorial resources elsewhere.

prejudicial effect upon the trial. *Id.* at 1075.[8] If the answer is yes, the speech may be regulated without running afoul of the First Amendment. The trial court, the Michigan Court of Appeals, the Michigan Supreme Court, and the principal dissenting opinion all applied the "substantial likelihood of material prejudice" test of *Gentile* or recognized that it was controlling. *See* Pet. App. 24a-30a (majority opinion of the Michigan Supreme Court); *id.* at 31a-32a, 42a (dissenting opinion of Justice Cavanagh); *id.* at 68a-70a (Michigan Court of Appeals opinion); *id.* at 90a, 92a (trial court opinion).

The Michigan Supreme Court divided, not over the applicability of the *Gentile* test, but over the outcome of applying that test on this record. *Compare id.* at 29a ("We * * * fail to see how [petitioner's] and her counsel's numerous public references to Bennett's prior indecent exposure conviction * * * did not have a substantial likelihood of materially prejudicing this sexual harassment proceeding.") *with id.* at 32a ("The conduct of [petitioner] and her attorneys was not substantially likely to materially prejudice the trial.") (Cavanagh, J., dissenting). The Court of Appeals would have remanded for further proceedings under *Gentile*. *See id.* at 70a (remanding for "a full evidentiary hearing" on "the 'substantial likelihood' test in *Gentile*"). And the trial court ruled that the information disseminated by petitioner and her counsel "would have a substantial likelihood of tainting the trial of this action." *Id.* at 83a. *See also id.* at 90a (*Gentile* "affords no refuge" to petitioner because "the decision did not affect the constitutionality of provisions that forbid speech by attorneys that will have a substantial likelihood of materially prejudicing an adjudicative proceeding").

Petitioner contends that the court below failed correctly to apply *Gentile*, and her argument consists in large measure of

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[8] Except as otherwise noted, all of the citations to *Gentile* herein are to portions of the opinion of the Court authored by Chief Justice Rehnquist.

claims that the Michigan Supreme Court erred in its understanding or recitation of the pertinent facts. *See* Pet. 5 n.3, 10, 16, 23-24. For example, petitioner accuses the court below of "ignoring the actual facts" regarding the public statements that she and her counsel made. *Id.* at 23. She also asserts that it is "factually untrue" that later media accounts of Bennett's conviction stemmed from the September 11 press release. *Id.* at 16.

But this Court generally does not use its certiorari power to consider such contentions. *See* S. Ct. R. 10 ("A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). All three of the courts below agreed that *Gentile* applied in this case, and petitioner does not contend otherwise.[9] The fact-bound application of the *Gentile* test in this case does not warrant further review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT.

Petitioner contends that a court must hold a hearing, consider certain matters, make findings of fact, and then issue an appropriate order "*before* a court may restrain parties or their attorneys from making public statements about a pending case." *Id.* at 14 (emphasis in original). In support of that contention, petitioner cites a long string of federal and state

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[9] While not disputing that *Gentile* is controlling here, petitioner relies heavily upon *Bridges* v. *California*, 314 U.S. 252 (1941). *See* Pet. 12-13, 22-23. The question in that case was whether the contempt power may be used to punish the media for extra-judicial statements. In *Gentile*, the petitioner, relying on *Bridges* and other cases, urged the Court to adopt a "clear and present danger" standard, but the Court declined to do so, thereby limiting the reach of *Bridges*. *Gentile*, 501 U.S. at 1069. *Gentile*, not *Bridges*, controls in this case.

cases, Pet. 14-15, none of which she discusses in any detail, that she claims conflict with the decision below. Not so.

Almost none of petitioner's cases apply to the situation presented here, for those cases involve the standard for imposing a *prior restraint* on the speech of trial participants and media observers—what is pejoratively called in this context a "gag order."

For example, in petitioner's lead case, *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir. 1970) (*per curiam*), the district court ordered the defendants, their counsel, and the Government to "make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or dissemination in any fashion" regarding the jury, the evidence, the witnesses, the court's rulings, or the merits of the case. *Id.* at 1060. This order was, of course, a prior restraint. *See id.* at 1062 ("The order of the district court imposes a prior restraint on protected first amendment conduct").

Similarly, in *United States* v. *Salameh*, 992 F.2d 445 (2d Cir. 1993) (*per curiam*), another case on which petitioner relies, the district court issued an order "barring counsel for all parties to the present action from publicly discussing any aspect of the action." *Id.* at 446. This order, too, was a prior restraint. *See id.* ("An order that prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech."). Nearly all of petitioner's other cases also involved prior restraints.[10]

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[10] *See United States* v. *Noriega*, 917 F.2d 1543, 1545 (11th Cir.) ("This case [involves] * * * CNN's First Amendment right to be free from prior restraints against the broadcasting of newsworthy information."), *cert. denied*, 498 U.S. 976 (1990); *Bailey* v. *Systems Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988) ("Moreover, this order is a prior restraint on speech"); *Levine* v. *U.S. Dist. Ct. for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985) ("[T]he district court's order is properly characterized as a prior restraint."), *cert. denied*, 476 U.S. 1158 (1986); *CBS Inc.* v. *Young*,

This Court clarified the definition of a "prior restraint" in *Alexander* v. *United States*, 509 U.S. 544 (1993). There, the Court explained that "[t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' " *Id.* at 550 (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984) (emphasis omitted)). In so doing, the Court emphasized that "our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments." *Id.* at 553-554. *See also id.* at 553 (reaffirming the "time-honored distinction between barring speech in the future and penalizing past speech").

The *Alexander* Court also explained that the distinction between a prior restraint on future speech and punishment subsequent to speech "is critical to our First Amendment jurisprudence" because "we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments." *Id.* at 554 (citing *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975)). "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions*, 420 U.S. at 559 (emphasis in original).

There is no conflict between the prior restraint cases that petitioner cites and the decision below—nor could there be—because the instant case does not involve a prior restraint.

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522 F.2d 234, 239 (6th Cir. 1975) (*per curiam*) ("Examining the May 6 order * * * we think the conclusion is inevitable that it constitutes a prior direct restraint upon freedom of expression."); *Twohig* v. *Blackmer*, 918 P.2d 332, 335 (N.M. 1996) ("An order such as the one issued here * * * is a prior restraint."); *Kemner* v. *Monsanto Co.*, 492 N.E.2d 1327, 1337 (Ill. 1986) ("[T]he April 2 order constitutes an impermissible prior restraint on Monsanto's right of free speech.").

Petitioner and her attorneys were never subjected to a "gag order" or ordered not to speak. *See* Pet. App. 19a n.22, 67a, 88a n.4. Her lawsuit was dismissed as a sanction after she and her attorneys violated longstanding and well-known ethical rules by jointly and intentionally engaging in a campaign to publicize inadmissible evidence and thereby taint the potential jury pool. This Court in *Gentile* specifically ruled that such regulation comports with the First Amendment, holding that the substantial likelihood of material prejudice standard furthers the state's "substantial interest" in fair trials and is "narrowly tailored" to that end. *Gentile*, 501 U.S. at 1075, 1076. Thus, this case does not involve a prior restraint on speech but a *subsequent punishment* for violating settled and constitutional standards regulating the pre-trial speech of those participating in litigation.

Notably, the last case that petitioner cites (with a "see also" signal) did not involve a prior restraint, and it proves the point that the First Amendment permits a court to impose sanctions for past speech even if the sanctions were not preceded by the kind of process or court order that petitioner contends is necessary. *See Attorney Grievance Comm'n of Md.* v. *Gansler*, 835 A.2d 548 (Md. 2003). In that case, Maryland's highest court sanctioned a state prosecutor for making public statements that the lawyer knew or reasonably should have known would have a substantial likelihood of materially prejudicing an adjudicative proceeding. As in this case, there was no prior restraint on speech in *Gansler*; the sanctions were imposed based on past speech. In so doing, the court applied *Gentile*. *See Gansler*, 835 A.2d at 564-566.

As *Gansler* shows, the First Amendment does not require a court to issue a gag order before it imposes sanctions for litigation misconduct or unethical behavior. *See also, e.g., In re Morrissey*, 168 F.3d 134 (4th Cir.), *cert. denied*, 527 U.S. 1036 (1999).[11] Indeed, for confirmation of this point one

[11] In *Morrissey*, an attorney held a press conference at which he questioned the credibility of a witness, in violation of a local rule.

need look no further than *Gentile*. There was no gag order in *Gentile*, which is not surprising since the attorney speech at issue was delivered at a press conference held the day after the attorney's client was indicted. No member of the Court suggested in *Gentile* that the attorney could not be sanctioned unless he had first been subjected to a gag order.

Because this case involves a subsequent punishment for violating the ethical standard upheld in *Gentile*, petitioner was not entitled to the greater protection afforded by the First Amendment in prior restraint cases, such as those on which petitioner relies. Thus, almost all of petitioner's case law is simply inapposite here, and there is no conflict with the decisions of this Court or any other court.

III. THE SUPREME COURT OF MICHIGAN CORRECTLY HELD THAT THE DISMISSAL OF PETITIONER'S CASE AS A SANCTION FOR LITIGATION MISCONDUCT DID NOT VIOLATE THE FIRST AMENDMENT.

Review should also be denied because the court below was correct to hold that the dismissal of petitioner's case as sanction for the flagrant misconduct of petitioner and her attorneys did not violate the First Amendment.

The First Amendment is not the only constitutional right at stake in this case. Respondent has a right to due process, which encompasses the subsidiary right to a fair trial by an impartial jury. *See Weiss* v. *United States*, 510 U.S. 163, 178 (1994) ("It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.' ") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[12]

His punishment included 90 days' imprisonment, three years' probation, and two years' suspension from practice. There was no gag order in place when the attorney held the press conference.

[12] The right to a fair trial obtains in both civil and criminal cases. *See, e.g., Davidson* v. *Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995).

"This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 378 (1979). Because of the dangers posed by pretrial publicity, a trial judge has "an affirmative constitutional duty" to ensure that "the fairness of a trial will not be jeopardized by the dissemination of [prejudicial inadmissible] information throughout the community before the trial itself has even begun." *Id.* at 378, 379.[13] "Paramount among these dangers is the potential that pretrial publicity may taint the jury venire, resulting in a jury that is biased toward one party or another." *United States* v. *Brown*, 218 F.3d 415, 423 (5th Cir. 2000), *cert. denied*, 531 U.S. 1111 (2001).

It is a fundamental precept of the American legal system that lawsuits are to be tried in court, not the media. *See Bridges*, 314 U.S. at 271 ("The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."); *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."); *see also Pennekamp* v. *Florida*, 328 U.S. 331, 359 (1946) (Frankfurter, J., concurring) (discussing the problem of "trial by newspapers").

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[13] *See also Gentile*, 501 U.S. at 1075 ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966) (due process demands "a trial by an impartial jury free from outside influences" especially given "the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors").

In balancing the competing interests of free speech and fair trials, this Court in *Gentile* held that the same ethical standard applied by the Michigan Supreme Court under Rule 3.6—a standard prohibiting speech that an attorney knew or should have known created a "substantial likelihood of material prejudice" in a pending proceeding—strikes a constitutionally permissible balance. *See* 501 U.S. at 1075 ("We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."). That holding covers Rule 3.6 and the standard applied by the Michigan Supreme Court. *See Gentile*, 501 U.S. at 1068 n.1. Thus, petitioner's argument that *Gentile* "struck down standards like those in Michigan's Rule 3.6 as void for vagueness" (Pet. 19) is simply incorrect. *Gentile* did not strike down the Nevada rule as void for vagueness. Rather, it held only that the rule was vague *as applied* to the specific speech in that case.

Petitioner can raise no plausible argument that the "substantial likelihood" standard is vague as applied to the speech for which she was sanctioned—a deliberate campaign to publicize evidence that had been ruled inadmissible at trial. This type of speech long has been recognized as creating a substantial likelihood of prejudice and falls within the core of the prohibition embodied in Rule 3.6 and upheld in *Gentile*. When inadmissible evidence is disseminated through the organs of mass communication, the risk of a tainted jury is grave. For "the exclusion of such [inadmissible] evidence in court is rendered meaningless when news media make it available to the public." *Sheppard*, 384 U.S. at 360. As this Court said in *Gentile*, "[e]xtrajudicial comments on, or discussion of, evidence which might never be admitted at trial * * * obviously threaten to undermine [a] basic tenet" of our legal system—namely, that a trial "is to be decided by impartial jurors * * * based on material admitted into evidence before them in a court proceeding." 501 U.S. at 1070.

The kind of inadmissible evidence at issue in this case—prior conviction evidence—can be especially prejudicial. *See, e.g.*, Fed. R. Evid. 404(b); Mich. R. Evid. 404(b). Indeed, in *Marshall* v. *United States*, 360 U.S. 310 (1959), this Court, exercising its supervisory power, granted a new trial to a criminal defendant because of publicity given to such evidence. The Court vacated the defendant's conviction for the unlicensed dispensing of drugs because of the publication of two newspaper articles disclosing that he had previously practiced medicine without a license—evidence that the trial court had ruled inadmissible—and had a prior conviction for forgery. This Court stated:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures. [*Id.* at 312-313 (citation omitted).]

See also Irvin v. *Dowd*, 366 U.S. 717, 725 (1961) (vacating conviction because pretrial publicity, including press stories referring to prior criminal record, tainted jury pool).

The First Amendment confers no right upon a litigant or her attorneys to taint the potential jury pool by deliberately publicizing inadmissible evidence and thereby deny the defendant's right to a fair trial. As Justice Frankfurter said:

> [I]n a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote. [*Pennekamp*, 328 U.S. at 366 (concurring opinion).]

Here, once the trial court ruled that Bennett's prior conviction was inadmissible, petitioner and her counsel had no right to undermine that evidentiary ruling by publicizing the conviction through the media. *See Gentile*, 501 U.S. at 1071 ("An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."); *Fisher* v. *Pace*, 336 U.S. 155, 161 (1949) ("Counsel are required to confine their arguments to the evidence and must not touch upon matters withdrawn from the consideration of the jury."). The First Amendment did not bar the trial court from sanctioning that misconduct. *See Sheppard*, 384 U.S. at 363 ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.").

Petitioner argues that the First Amendment gave her a right to publicize Bennett's conviction because the conviction was a matter of public record. *See* Pet. 20 & n.7, 23. But the fact that inadmissible evidence might be available to the media in other ways cannot absolve attorneys of their ethical obligation to avoid making statements that are "designed to reach the farthest boundaries of the public consciousness" for the specific purpose of tainting the jury pool. Pet. App. 92a. As this Court noted in *Gentile*, " '[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.' " 501 U.S. at 1071 (quoting *In re Sawyer*, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring in the result)). The Court also quoted Justice Brennan's statement that " '[a]s officers of the court, court personnel and attorneys have a fiduciary duty not to engage in public debate that will * * * obstruct the fair administration of justice.' " *Gentile*, 501 U.S. at 1074 (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring in the judgment)). *See also Gentile*, 501 U.S. at 1081-82 (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from

engaging in what otherwise might be constitutionally protected speech."). The *Gentile* Court accordingly held that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." 501 U.S. at 1074.

Petitioner's "public record" argument also ignores the state expungement statute, which operated in November 2001 to convert Bennett's conviction into a "nonpublic record"—a record exempt even from the state freedom of information act. *See* Mich. Comp. Laws §§ 780.623(2), (4) (Pet. App. 99a-100a). In addition, Michigan law expressly defines the term "public record" to exclude documents "prepared, owned, used, in the possession of, or retained by" the judiciary. Mich. Comp. Laws §§ 15.232(d)(v), (e).

Petitioner also seeks to distinguish her conduct from that of her attorneys by arguing that "she had no reason to suspect that the trial court's June 21 comments restricted her statements to the media." Pet. 17-18. But not only did petitioner's attorneys engage in their own independent violations of Rule 3.6, the courts below specifically found that petitioner acted in concert with her attorneys to violate Rule 3.6 and taint the jury pool. Another rule, Rule 8.4(a), informed petitioner and her lawyers that they could not circumvent Rule 3.6 by having petitioner do that which her lawyers could not. *See* MRPC 8.4(a) ("It is professional misconduct for a lawyer to * * * knowingly assist or induce another to [violate the rules of conduct], or do so through the acts of another") (Pet. App. 106a).

Here, as the court below explained, petitioner's counsel "not only failed to restrain [petitioner] from repeatedly and intentionally publicizing Bennett's inadmissible expunged conviction in order to taint the potential jury pool and deny [Ford] a fair trial, they participated with [her] in the misconduct on numerous occasions." Pet. App. 24a. From Rule 8.4(a), petitioner and her lawyers knew, for example, that they should not have taken part in the June 26, 2002 "Justice

for Justine Committee" demonstration at which "participants distributed leaflets to the public containing information regarding Bennett's expunged conviction." Pet. App. 10a.[14]

By choosing to file a lawsuit against Ford, petitioner accepted certain limitations upon her ability to speak while the case was ongoing. Petitioner's counsel was likewise restricted when that counsel agreed to represent her. "Although litigants do not 'surrender' their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in this setting." *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984) (internal quotation marks and citation omitted) (quoted with approval in *Gentile*, 501 U.S. at 1073). The First Amendment permits such limitations, in part because they are temporary; they generally last only until the conclusion of the trial and post-trial proceedings. *See Pennekamp*, 328 U.S. at 346 ("It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation."). The First Amendment also tolerates such limitations because they are necessary to the conduct of a fair trial. *See Estes* v. *Texas*, 381 U.S. 532, 540 (1965) ("We have always held that the atmosphere essential to the preser-

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[14] There was also no question about the possible consequences of violating the restrictions. Petitioner and her counsel were told by the trial judge: "If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss this case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client." Tr. of June 21, 2002 Hrg. at 29-30; *see also* Pet. App. 7a-9a. And petitioner stated publicly that "[i]f we don't act the way he [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me * * *." Pet. App. 10a.

vation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.").

In a footnote, petitioner objects that "the trial court in this case did not even consider whether there was in fact any prejudice to the defendant's right to a fair trial." Pet. 14 n.4. But the court below correctly rejected a "requirement that actual prejudice be shown." Pet. App. 28a. The inquiry under *Gentile* is whether the public comments at issue "are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." 501 U.S. at 1075. The petitioner in *Gentile* argued that "there must be a finding of 'actual prejudice or a substantial and imminent threat to a fair trial,' " but this Court held that "the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment." *Id.* at 1063. The court below applied that exact standard in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUSTINE MALDONADO,
Petitioner,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF

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STATEMENT OF FACTS

Ford claims that the Michigan Supreme Court majority properly found that the plaintiff and her attorneys violated a trial court's "order" by making statements to the media about Daniel Bennett's prior conviction for indecent exposure and about the facts underlying that conviction.

In silence, however, Ford does not defend the Supreme Court's numerous claims that the plaintiff or her attorneys made "repeated" statements to the media about those subjects. In silence, Ford agrees that the petitioner and her counsel made one statement each on that subject to the media. Pet. For Cert. 10.

Nor does Ford dispute that the supposed "order" consisted of nothing more than an admonition to counsel to comply with the "ethical obligations" that governed the conduct of attorneys. There is, however, only one ethical rule in Michigan that applies to public comments by attorneys—Rule 3.6 of the Michigan Rules of Professional Conduct. That obligation, which Ford never quotes, provides as follows:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

App. 103a.

Of all of the statements cited by Ford in its brief, there is *exactly one* that even falls in the category of statements that could be governed by Rule 3.6—the September 11, 2001, press release issued by plaintiff's counsel.

But instead of analyzing that statement, Ford has repeated every public or semi-public statement made by the plaintiff, by her attorneys, by the media, or by third parties. Ford Br. 3-9. Unless Ford is simply attempting to prejudice the Court by citing irrelevant material, it must believe that *every* public

statement by the plaintiff or her attorneys is either a violation of Rule 3.6 or evidence of a violation of Rule 3.6.

If Ford alone held that view, it would be disturbing. But as a review of the majority Opinion below demonstrates, the Michigan Supreme Court has adopted the same approach. App. 4a, n. 5; 6a, n. 9.

Far from providing a reason for this Court to deny the writ, Ford's Brief provides ample reasons why this Court should grant the writ.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH DECISIONS BY THE SECOND, THIRD, SIXTH, SEVENTH, NINTH AND ELEVENTH CIRCUITS AND WITH DECISIONS BY THE HIGHEST COURTS OF ILLINOIS, MARYLAND, MONTANA, NEW MEXICO, AND OHIO.

As set forth in the Petition, the decision of the Michigan Supreme Court majority conflicts with decisions by six federal circuits and five state supreme courts setting forth the minimum procedural requirements that must be followed by a trial court before it restricts speech about pending cases by parties or by their attorneys. Pet for Cert, 14-17.

In its response, Ford claims that "almost none" of petitioner's cases apply to the situation presented here, because, it says, those cases govern the standards for imposing a "prior restraint," which, supposedly, is not at issue here. Ford Br. 17.

But this case does not turn on the definition of a "prior restraint." According to the majority of the Michigan Supreme Court, the trial judge's comments from the bench were the *equivalent* of an order restraining speech by the plaintiff and her attorneys:

> The transcript of the exchange, which we have set forth on pages 9 to 11 of this opinion [App. 7a-9a], makes it quite clear that *the parties were advised in no uncertain terms that references to the excluded conviction were to*

> *cease.* Contrary to Justice Cavanagh's assertion, Judge Giovan [the trial judge] *explicitly warned the parties and the attorneys that that further reference to the excluded conviction would result in dismissal.*

App. 20a, n. 23 (emphasis added).

In fact, the Supreme Court majority, quoting the trial judge, makes clear that no order restraining speech was even necessary because *Rule 3.6 was in and of itself equivalent to a gag order issued by a court*:

> So, what I say, *I'm not going to issue a gag order because the rules of professional conduct already have a standard that bind you.* So, why should Judge Giovan . . . select his own criteria for what people should say *when we have standing rules that govern what attorneys are permitted to say*?

App. 19a, n. 22 (emphasis added).

The words of the Michigan Supreme Court make the conflict between its decision and that of six circuits and five state supreme courts clear, obvious, and direct.

In six federal circuits and five states, a trial judge may not enter an order restraining speech by parties or attorneys (1) without conducting a hearing to balance the rights of free speech and fair trial, (2) without making specific findings of fact, and (3) without issuing a precise and narrowly-tailored order. See Pet. for Cert. 14-17. In Michigan, however, a trial judge may restrain speech by parties and attorneys simply by referring to Rule 3.6 in the middle of a colloquy on other issues.

This case dramatizes the importance of the conflict. The Comments to the Michigan Rule recognize that "ordinarily" an attorney should not make public statements about a prior conviction or about evidence that has been excluded from the trial. App. 104a. But the word "ordinarily" implies that there are exceptions. Among those exceptions, a court or discipline board might determine that comments about particular evidence was warranted because of the importance of those facts to public debate, because the comments covered matters that

were already a matter of public discourse, or because the comments were necessary in order to describe the nature of a pending appeal. App. 105a-106a.

In this case, however, the trial court conducted no hearing and entered no findings of fact. It is thus not clear that the trial judge *ever balanced* the interests at stake. If he did, there is no clear determination that can be reviewed by this or any other court. In fact, because the trial court issued its "order" so casually, there is not even a finding as to who said what and why.

Finally, as will be discussed in more detail below, the trial court's failure to specify *who* was restricted from saying *what* to *whom* meant that the *only* standard the parties had to govern their conduct was Rule 3.6 and its Comments—standards that are identical to those that this Court found void for vagueness in *Gentile v State Bar of Nevada*, 501 U.S. 1030, 1048-1049, 1082 (1991).

The procedure approved by the Michigan Supreme Court majority is extremely dangerous. If a trial court can dismiss a case because a lawyer, or still worse, a party, purportedly violated a vague standard proclaimed without a hearing and without specific findings of fact to support it, speech is more severely restricted than under a ". . . a deliberate statutory scheme of censorship . . ." because at least under a system of censorship a lawyer or party would have "an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find [that] an utterance" had violated Rule 3.6. *Bridges v State of California,* 314 U.S. 252, 269 (1941).

The issue at stake is not a "fact-bound application of *Gentile*," as Ford would have it (Ford Br, p. 16). The issue at stake is the minimal procedures that a state must adopt in order to ensure that the rights guaranteed by *Gentile* and *Bridges* are actually protected.

Until this Court grants the writ and resolves the conflict between Michigan and all other jurisdictions, speech in Mich-

igan will remain in a deep freeze as the threat of peremptory dismissal continues to hang over the head of every party and every lawyer who considers speaking out about an issue of public concern that arises in a legal case in the state courts of Michigan.

II. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF SIX FEDERAL CIRCUITS AND FIVE STATE SUPREME COURTS BECAUSE IT PUNISHES SPEECH UNDER STANDARDS THAT ARE UNDENIBALY VOID FOR VAGUENESS.

Before a court restricts First Amendment rights, it has an *obligation* to tailor an order "as precisely as possible to the exact needs of the case." *Carroll v President and Commissioners of Princess Anne*, 393 U.S. 175, 184 (1968). In this case, however, the trial judge *refused* to tailor the order to the specific facts of this case, saying "I think I don't have the right to decide for myself what a lawyer can say to the public." App. 38a.

Having, however, refused to specify what a lawyer could say beforehand, the trial judge then dismissed the case because counsel (and the plaintiff) guessed wrong about how the trial court would later interpret Rule 3.6.

On appeal, the four-Justice majority of the Michigan Supreme Court backed up the absence of *any* order saying that "Even without an *explicit* [i.e. clear] order precluding plaintiff and her counsel from publicizing Bennett's excluded conviction, [the trial judge] chose a principled course in dismissing plaintiff's case to protect the administration of justice." App. 21a (emphasis added).

Ford supports this "procedure."

As to Maldonado, Ford claims that because she was in the courtroom when the trial judge referred to the ethical obligations, she was ". . . clearly put on notice that any violation of ethical obligations . . . could result in the dismissal of the

case with prejudice." Ford Br, at 7. But if the clear terms of ethical obligations do not apply to Maldonado, hearing a reference to those obligations does not put her on notice that she has to comply with them.

As to counsel, Ford does not suggest how an "order" issued in May 2002 provided notice as to a press release issued in September 2001. Nor does Ford say how Rule 3.6 provided notice to counsel as to the speech that was proscribed, when this Court had previously held that an identical rule was void for vagueness in the precise ways that are at issue here. See Pet. For Cert. 19-21.[1]

Ford, of course, claims that this is "simply incorrect," because "*Gentile* did not strike down the Nevada Rule as void for vagueness," but rather "held only that the rule was vague as applied to the specific speech in that case." Ford Br., at 22. But that statement is not only wrong—it is deliberately dishonest.

At the exact pages cited in the Petition for Certiorari, Justice Kennedy stated: "As interpreted by the Nevada Supreme Court, the Rule is void for vagueness . . ." *Id.*, 501 U.S. at 1048. And Justice O'Connor stated: "I believe that Nevada's Rule is void for vagueness." *Id.*, 501 US at 1082.

In fact, if anything, there is an additional factor, apparent in the text of the Michigan Rule, which makes it vaguer than the Nevada Rule that was found void for vagueness in *Gentile*. In this case, unlike most of the comments in *Gentile*, the speech at issue refers to matters that are contained in one or more public records.[2] Contrary to Ford's claim that attorneys

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[1] Ford does not dispute that the Nevada Rule at issue in *Gentile* is essentially identical to the Michigan Rule and its accompanying Comments. Compare the Nevada Rule, *Id.*, 501 U.S. at 1060-1061, with the Michigan Comments. App. 103a-106a.

[2] Ford claims that Bennett's conviction was not a public record because it was sealed in November 2001 (Ford Br. 25). But the only statement to the media by counsel about Bennett's conviction was made in September 2001. Similarly, Ford claims that Bennett's conviction and the facts that

may not speak on matters that are already part of the public record (Ford Br. 24), the Comments to the Michigan Rule specifically recognize that counsel have a safe harbor, founded on the decisions of this Court,[3] allowing them to comment on information contained in a public record, "notwithstanding" any other provision of the Rule. App. 105a.

As with all vague standards, the trial court's reference to Rule 3.6 had all the faults of a vague restriction on speech.

The plaintiff and her attorneys had no standard to govern their conduct.

Nor did the courts and disciplinary boards have any standards to regulate the enforcement of this Rule. Michigan's Attorney Grievance Commission and three Justices of the Supreme Court found that counsel had committed no violations of the ethical rules. App. 43a, n. 7. The trial judge and the Supreme Court majority, however, found that plaintiff's counsel had committed numerous violations of those same rules.

In fact, the lack of standards would be comical, if it were not so serious. At various times, the trial court or the majority found, or seemed to find, that counsel or the plaintiff had violated the judge's "order" by appearing in broadcasts where others talked about the conviction, by being present when third parties distributed leaflets discussing the conviction, by failing to dissuade third persons from distributing those leaflets, by stating that metro Detroit has a "company town feeling," by providing documents [i.e. pleadings] to a reporter, by "telling" a hundred friends, family members, co-workers and

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gave rise to it are not a public record because judicial records are not subject to the state Freedom of Information Act (Ford Br. 25). But surely when any member of the public could read about Bennett's conviction in the files of six courts in Michigan, including the Michigan Supreme Court, the information is in a "public record" for purposes of Rule 3.6, even if it is not for purposes of the state Freedom of Information Act.

[3] *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 496 (1975); *Landmark Communications v. Virginia*, 435 U.s. 829 (1978).

others about Bennett's conviction, and by issuing a press release months before the judge even issued the "order." App. 20a-24a; 83a-89a.

Finally, and as always, the vague "order" opened the way to discriminatory enforcement. The trial court and the Supreme Court majority found that Bennett's counsel had *not* violated the "order" when he called every woman who sued Bennett a greedy liar who was attempting to capitalize on Bennett's conviction. App. 8a, 40a-41a. But the same courts found Maldonado's lawyers had violated the "order" when they did not even refer to the conviction. App. 23a-24a.

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v United States*, 318 U.S. 332, 347 (1943)(Frankfurter, J.). In implementing that profound directive, this Court as long held that "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v Button*, 371 U.S. 415, 483 (1963).

As Michigan has now thrown that vital protection to the winds, this Court should grant the writ so that Michigan's application of the First Amendment can be brought into compliance with the standards that this Court has applied for over a half century—and that every other jurisdiction has long recognized as essential if liberty is to be preserved.

III. THE MAJORITY OF THE MICHIGAN SUPREME COURT WRONGLY DISMISSED THIS CASE ON THE BASIS OF SPEECH THAT WAS PROTECTED BY THE FIRST AMENDMENT.

Ford concludes its brief by attempting to wrap itself in the mantle of a fair trial. Ford Br. 20-21.

But Ford never sought a fair trial. It never complained about the September 11 press release; never filed a motion asking for an order restricting speech; never asked for a postponement; never asked for a change of venue; never asked for special voir dire; and never asked for sequestration. Instead of doing *anything* to secure a fair trial, Ford used speech as an

excuse to get no trial. And that is what the Michigan Supreme Court majority gave it—not a fair trial, but no trial.

In attempting to sustain that dismissal, Ford and the Michigan Supreme Court majority now employ arguments that should command the attention of this Court.

To make up for the fact that the plaintiff and her counsel actually made *one* statement each to the media about Bennett's conviction, the majority of the Michigan Supreme Court held Maldonado and her attorneys responsible for *every* media statement about Bennett's conviction—even though the conviction and the facts underlying it were in the public files of six courts and two police departments and were in the pages of the *New York Times* and the *Detroit Free Press*. App. 4a, n. 5; 6a, n. 9.

Similarly, in its brief, Ford makes explicit the premise of the Michigan Supreme Court's decision. According to Ford, once the trial court excluded evidence of Bennett's conviction and the facts underlying it, Maldonado's attorneys could *never* say anything to the media about those facts, no matter how great the First Amendment interests may be and no matter what exceptions there were in Rule 3.6:

> Here, once the trial court ruled that Bennett's prior conviction was inadmissible, petitioner and her counsel had no right to undermine that evidentiary ruling by publicizing the conviction through the media.

Ford Br. at 24.

There is no support for that claim. See Pet. for Cert. 23-25.

Finally, Ford makes explicit yet another unspoken premise of the majority opinion of the Michigan Supreme Court. According to Ford, Maldonado and her attorneys had no right even to be present at a peaceful rally on her behalf because someone else might pass out a leaflet that referred to Bennett's conviction:

> From Rule 8.4(a), petitioner and her lawyers knew, for example, that they should not have taken part in the June 26, 2002, "Justice for Justine Committee" demonstration at which "participants distributed leaflets to the public

containing information regarding Bennett's expunged conviction."

Ford Br., 25-26.

According to Ford—and the Michigan Supreme Court, App. 24a—because lawyers may not make certain statements, Rule 8.4(a) requires then to restrain their clients and third parties from making those statements. *Gentile's* narrow restriction on comments to the media *by lawyers* has been converted into an obligation on lawyers to enforce restrictions on their clients that do not even apply to them.

Instead of enforcing the First Amendment "as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow," *Bridges, supra*, 314 U.S. at 263, Ford asks this Court to sustain a construction of that Amendment that requires counsel to do everything possible to suppress public discussion.

As Ford's brief makes clear, one of the largest corporations in the world rightly believes that the Supreme Court of Michigan has declared war on the First Amendment. As this Court has done so many times before it should grant the writ and strike down the Michigan Supreme Court's outlandish and unprecedented attack on First Amendment rights.

CONCLUSION

The petitioner Justine Maldonado requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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